(1)

NO. 91-306



IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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ROBERT L. STEELE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

1. Does the "exculpatory no" doctrine apply to defendant's act of mailing documents in response to an IRS Special Agent's request in the course of a criminal investigation and provide a defense to a false statement charge under 18 U.S.C. § 1001?

2. Does a jury instruction that an omission from a tax return constitutes as a matter of law a material element of the crime, violate the Petitioner's right to a jury trial and constitute an unconstitutional irrebuttable presumption?

## TABLE OF CONTENTS

Page

APPENDIX

## TABLE OF AUTHORITIES

Page

Page

**STATUTES & CODES:**



**RULES:**

NO. _____

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## OPINIONS BELOW

The Opinion of the United States Sixth Circuit Court of Appeals (*en banc*) is reported at 933 F.2d 1313 (1991), and the prior decision of the United States Sixth Circuit Court of Appeals that was vacated by the *en banc* panel is reported at 896 F.2d 998 (1990).

## JURISDICTION

The May 21, 1991 judgment of the United States Court of Appeals for the Sixth Circuit affirmed Petitioner Steele's conviction of November 20, 1987. This Court's jurisdiction arises from 28 U.S.C. § 1254.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1001 provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device of material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

26 U.S.C. § 7206(1) provides in pertinent part as follows:

> Any person who willfully makes and subscribes any return, . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, in which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony.

18 U.S.C. § 371 provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act that affects the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

## STATEMENT OF THE CASE

On March 24, 1987, Petitioner Robert L. Steele was indicted on four counts: Count One was for conspiring to obstruct the IRS in its ascertainment, computation, assessment and collection of income taxes in violation of 18 U.S.C. § 371; Count Two was for filing a false 1981 U.S. Partnership Income Tax return in violation of 26 U.S.C. § 7206(1); Count Three was for filing a false 1981 1040 tax return in violation of 26 U.S.C. § 7206(1); and Count Four was for willfully submitting false documents to IRS Special Agent, Dennis Hall, in violation of 18 U.S.C. § 1001.

Petitioner was an accountant at the time of the incident described in the indictment. The counts of the indictment related to a real estate transaction involving the sale of two parcels of real estate in Montgomery County, Ohio, known as the Woodland Heights Property to Thomas Duerr for $80,000. Petitioner Steele sold two parcels to Thomas Duerr for $40,000 each, and in response to a request from Duerr, prepared real estate documents which reflected that the sale price was $20,000 for each parcel. Petitioner acted as a developer on the property and therefore identified the other $40,000 as a developer's fee. Petitioner developed the property himself and later sold it to a partnership known as the Woodland Heights Partnership in which the partners were Petitioner Steele, his wife, his accounting partner Dan Pelphrey, and Mrs. Pelphrey. Petitioner Steele kept $19,500 from a $39,000 gain from the sale of the Woodland Heights property in 1982. He omitted to list the $19,500 on his personal 1040 return for the tax year 1981, and did not list it on his 1065 Partnership return because the activities which generated the income were not partnership activities.

## FALSE STATEMENT COUNT UNDER 18 U.S.C. § 1001

In 1985, IRS Special Agent Dennis Hall contacted Petitioner Steele regarding an investigation into the drug ac-

tivities of Thomas Duerr, the buyer of the Woodland Heights property. Agent Hall wanted to interview Steele about Steele's sale of the Woodland Heights property to Duerr. Steele said he was leaving town, but he could photocopy all of the documents such as the deeds and closing statement created in the sale of the Woodland Heights property and forward them to Agent Hall. Steele then mailed a letter with all of the documents from the Woodland Heights property, and in the letter stated as follows:

> Dear Mr. Hall: Enclosed you will find copies of all the documents which we have in our possession regarding Thomas R. Duerr. Sincerely, Woodland Heights, Robert L. Steele, General Partner.

Steele also told Agent Hall to contact him if he had other questions about the Woodland Heights transaction. Hall never recontacted Steele. Hall further never notified Steele as to whether he was a witness or suspect in the Duerr investigation.

At trial, Steele moved at the conclusion of the government's case for a dismissal of the false statement charge based on the "exculpatory no" doctrine. Steele's motion was denied. Steele further requested a jury instruction on the "exculpatory no" doctrine, and that was similarly denied.

Steele argued that since he had been contacted by an IRS criminal investigator and made no statements or affirmative misrepresentations to the investigator but merely transmitted closing documents regarding the sale of the property to Agent Hall, that he had not violated the false statement statute. In addition, if his acts were construed to violate the false statement statute, then the "exculpatory no" defense would apply.

The "exculpatory no" defense developed as a result of the broad scope of the false statement statute which permits the government to prosecute anyone for an oral or written false statement made to a government official in the course of a matter within the jurisdiction of a federal agency. *U.S.* v.

*Medina de Perez*, 799 F.2d 540 (9th Cir. 1986). The doctrine evolved out of the Fifth Circuit case of *Paternostro* v. *United States*, 311 F.2d 298 (5th Cir. 1962), and precludes the government from forcing an individual to choose between incriminating himself in the course of a governmental investigation or violating the false statement statute.

The United States Sixth Circuit Court of Appeals in a 2-to-1 decision initially adopted the "exculpatory no" doctrine, and therefore concluded that Steele did not violate the false statement statute. (App. B)

The *en banc* court vacated the decision of the original Sixth Circuit panel and affirmed the conviction of Petitioner on the false statement count. The rationale of the *en banc* panel in a 9-to-6 decision was that Steele violated the false statement statute by mailing false documents to Special Agent Hall. The Sixth Circuit concluded that Steele willfully and knowingly submitted a false and material document to the IRS (App. A at P. 8, fn 5).

The Sixth Circuit noted that the "exculpatory no" doctrine has been adopted by six other circuit courts of appeals. However, the Steele court declined under the facts of this case to decide whether the "exculpatory no" doctrine is viable in the Sixth Circuit. (App. A at P. 2).

## REASONS FOR GRANTING THE WRIT

Although the Sixth Circuit expressly declined to adopt the "exculpatory no" doctrine, the majority of the *en banc* panel acknowledged concern with the sweeping language of 18 U.S.C. § 1001. As the Sixth Circuit majority noted:

> Virtually any false statement, sworn or unsworn, written or oral, made to a government employee could constitute a felony. (Appendix A at P. 13).

The broad scope of the false statement statute has been criticized by numerous federal circuit courts of appeals, and as part of that criticism, the "exculpatory no" doctrine was developed. The United States Fifth Circuit Court of Appeals in *Paternostro* v. *United States*, 311 F.2d 298 (5th Cir. 1962), adopted the "exculpatory no" doctrine upon examining the history of the false statement statute under 18 U.S.C. § 1001. The *Paternostro* court noted that the false statement statute evolved out of the false claim statute, which was designed primarily to protect the Government from frauds being perpetrated against it. *U.S.* v. *Bramblett*, 348 U.S. 503 (1955). The false statement statute was amended in 1934 to eliminate the restriction to cases involving pecuniary or property loss to the Government. *Paternostro*, 311 at F.2d at 303 (5th Cir. 1962).

Thus, according to its legislative history, the main thrust of 18 U.S.C. § 1001 was to prevent affirmative fraud from being perpetrated against the U.S. Government. Therefore, a defendant's exculpatory denials that he did not have knowledge of graft in the New Orleans Police Department or solicit graft in the New Orleans Police Department were not the type of statements targeted in the legislative history and purpose of the false statement statute. *Paternostro* v. *U.S.*, *supra*.

In addition to the Fifth Circuit, the First Circuit Court of Appeals in *U.S.* v. *Chevoor*, 526 F.2d 178 (1st Cir. 1975), the Fourth Circuit in *U.S.* v. *Cogdell*, 844 F.2d 179 (4th Cir.

1988), the Eighth Circuit in *U.S.* v. *Taylor*, 907 F.2d 801 (8th Cir. 1990), the Ninth Circuit in *U.S.* v. *Medina de Perez*, 799 F.2d 540 (9th Cir. 1986), and the Eleventh Circuit in *U.S.* v. *Tabor*, 788 F.2d 1144 (11th Cir. 1986) have all adopted the "exculpatory no" doctrine.

Based on the factual record presented to it, the Seventh Circuit declined to adopt the doctrine. *U.S.* v. *King*, 613 F.2d 670 (7th Cir. 1980). Similarly, four other U.S. circuit courts of appeal including the Sixth Circuit have declined to adopt the doctrine under the fact situations in which it was presented to those courts. In addition to the Sixth Circuit, the Second Circuit in *U.S.* v. *Capo*, 791 F.2d 1084 (2nd Cir. 1986) declined to adopt it but stated that it would be construed narrowly (Accord *U.S.* v. *Fitzgibbon*, 619 F.2d 874 (10th Cir. 1980); *U.S.* v. *White*, 887 F.2d 267 (D.C. Cir. 1989)).

The false statement statute, as almost all of the circuit courts have noted, is one that has overwhelming reach and widespread application. This Court has not considered whether exculpatory denials to a governmental investigator constitute a crime within the framework of the false statement statute. 18 U.S.C. § 1001. Moreover, there are unsettled issues regarding what type of conduct would permit an "exculpatory no" defense under 18 U.S.C. § 1001. This Court should grant Petitioner's Writ under both 10.1(a) and 10.1(c) of the Rules of this Court.

## 1. THE VARIOUS CIRCUIT COURTS OF APPEAL ARE IN CONFLICT REGARDING THE SCOPE AND APPLICABILITY, IF ANY, OF THE "EXCULPATORY NO" DOCTRINE.

A review of the decisions of the various circuit courts of appeal demonstrates that this critically important question regarding the limitation on the false statement statute under the "exculpatory no" doctrine remains completely unsettled.

Three federal circuit courts of appeal have adopted a five part test to determine whether the "exculpatory no" defense is applicable in a prosecution pursuant to 18 U.S.C. § 1001. The test includes the following elements:

(1) The false statement must be unrelated to a claim to a privilege, or a claim against the government;

(2) The declarant must be responding to inquiries initiated by a federal agency or department;

(3) The false statement must not impair the basic functions entrusted by law to the agency;

(4) The government's inquiries must not constitute a routine exercise of administrative responsibilities; and

(5) A truthful answer would have incriminated the declarant. *United States* v. *Medina de Perez*, 799 F.2d 540 (9th Cir. 1986). See also *U.S.* v. *Cogdell*, 844 F.2d 179 (4th Cir. 1988); *U.S.* v. *Taylor*, 907 F.2d 801 (8th Cir. 1990).

However, even the circuits that have adopted the five part "exculpatory no" test do not uniformly apply it. Unlike the other two circuits using the test, the Ninth Circuit in *U.S.* v. *Alzate-Restreppo*, 890 F.2d 1061 (9th Cir. 1989) held that the defendant must be in a post-arrest investigative setting to assert the defense. (Also see *U.S.* v. *Meyers*, 878 F.2d 1142, 1144 (9th Cir. 1989)).

In the instant case, the Sixth Circuit expressly rejected the five-part test of the Fourth, Eighth and Ninth Circuits and concluded that the fourth and fifth elements of the test were flawed and unnecessary. *U.S.* v. *Steele*, 933 F.2d at 1320. (App. A at P. 12). The Sixth Circuit concluded that there was no basis for distinguishing between a Federal agency's administrative and investigative functions, citing *U.S.* v. *Rogers*, 466 U.S. 475, 479 (1984). The Sixth Circuit similarly rejected the fifth element (that a truthful answer would have incriminated the declarant) because it reasoned that the declarant should exercise his Fifth Amendment privilege to

remain silent rather than answer with a falsehood. Accordingly, the Sixth Circuit has impliedly rejected the "exculpatory no" defense by asserting that an individual cannot make an exculpatory remark without violating the false statement statute.

Adding to the confusion among the circuit courts of appeal is the dichotomy between the Ninth Circuit and the Seventh Circuit. In *U.S.* v. *Alzate-Restreppo*, 890 F.2d 1069 (9th Cir. 1989), the Ninth Circuit held that the defense is only available after a defendant has been read his Miranda rights. In contrast, the Seventh Circuit in *U.S.* v. *King*, 613 F.2d 670, 675 (7th Cir. 1980) declared that the "exculpatory no" defense is not available to someone who makes an exculpatory statement after being read his Miranda rights.

There are additional conflicting interpretations regarding what type of statement made by a declarant to a government investigator will qualify for the protection of the "exculpatory no" defense. The Second Circuit in *U.S.* v. *Capo*, 791 F.2d 1054, 1069 (2nd Cir. 1986) without expressly adopting the defense, held that any response beyond a simple "no" does not fall within the exception. In *U.S.* v. *King*, 613 F.2d 670, 674 (7th Cir. 1980), the Seventh Circuit held that ". . . the doctrine is limited to simple negative answers."

In contrast, the Eleventh Circuit in *U.S.* v. *Tabor*, 788 F.2d 714 (11th Cir. 1986) affirmed the applicability of the defense where the defendant falsely represented to the IRS that she only notarized mortgage documents where the subscribers personally appeared before her. Accord *U.S.* v. *Bush*, 503 F.2d 813 (5th Cir. 1974) (defendant executed false affidavit for IRS); *U.S.* v. *Meyers*, 878 F.2d 1142 (9th Cir. 1989) (defendant lied to Secret Service about reason his plane had flown into prohibited air space); *U.S.* v. *Taylor*, 907 F.2d 801, 803 (8th Cir. 1990) (defendant lied during course of Federal bankruptcy proceeding).

Accordingly, there are widespread conflicts among the cir-

cuit courts of appeal as to whether the "exculpatory no" defense is literally limited to a simple "no" response, or can be applied where there are affirmative exculpatory misrepresentations to Federal investigators.

Despite the inconsistent adoption, application and scope of the "exculpatory no" doctrine, virtually all of the circuit courts of appeal agree that the false statement statute is extremely broad and could make virtually any false statement, sworn or unsworn, written or oral, made to a government employee a felony. *U.S.* v. *Medina de Perez*, *supra* at p. 543-44; *U.S.* v. *Steele*, *supra* at p. 1321; and *U.S.* v. *Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972).

Despite the acknowledged concern with the Draconian nature of the false statement statute, the Sixth Circuit in *Steele* held that the proper approach to limiting its impact is to rely on prosecutorial discretion. (App. A at P. 14). However, the facts in *Steele* demonstrate that reliance on prosecutorial discretion is patently inadequate. To criminalize Steele's act of transmitting copies of documents that were prepared four years earlier to an IRS agent at the agent's request highlights the parade of horribles that the broad scope of the false statement statute permits. As the dissent in *Steele* points out, Steele's conduct would have been criminalized even if he had no interest in the land transaction, and merely had possession of the relevant documents as Duerr's accountant. (App. A at P. 20). Accordingly, the Sixth Circuit's option of deferring to prosecutorial discretion encourages the type of overreaching indictment and conviction that occurred in *Steele*.

Moreover, the Sixth Circuit's reliance on prosecutorial discretion is the very basis why this court must decide the scope and extent of the "exculpatory no" doctrine. In the Second, Sixth and Tenth Circuits, there appears to be no basis for asserting the doctrine whereas the Seventh and Ninth Circuits distinguish between whether one has been Mirandized or not to determine whether the doctrine is applicable. The

First, Fourth, Fifth and Eleventh Circuits give wide protection to exculpatory denials which include affirmative misrepresentations to the government. This Court should alleviate the confused state of federal law regarding the "exculpatory no" doctrine.

Prosecutorial discretion permits an intolerably scatter-shot approach to the enforcement of the false statement statute. This case presents a perfect opportunity for this Court to adopt the "exculpatory no" doctrine as a proper restriction on the impact and effect of the sweeping language of the false statement statute.

## 2. THIS COURT SHOULD DECIDE WHETHER THE "EXCULPATORY NO" DOCTINE PROVIDES ADDITIONAL FIFTH AMENTMENT PROTECTION AGAINST THE OVERBROAD APPLICATION OF THE FALSE STATEMENT STATUTE.

Although without explicitly stating it, numerous circuit courts have held that the overbroad application of the false statement statute comes perilously close to violating an individual's Fifth Amendment rights. *Paternostro* v. *U.S.*, 311 F.2d 298 (5th Cir. 1962); *U.S.* v. *Taylor*, 907 F.2d 801 (8th Cir. 1990); *U.S.* v. *Equihau-Juarez*, 851 F.2d 1222, 1227 (9th Cir. 1988); *U.S.* v. *Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *U.S.* v. *Tabor*, 788 F.2d 714, 717 (11th Cir. 1986); *U.S.* v. *Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (*en banc*); *U.S.* v. *Payne*, 750 F.2d 844, 861-63 (11th Cir. 1985). The Fifth Amendment of the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."

Accordingly, the "exculpatory no" doctrine which is rooted in the Fifth Amendment precludes a person such as Steele from being forced to decide either to disclose to the IRS that four years earlier he had prepared false documents, or to

transmit those documents in response to an IRS request and be convicted of a false statement violation. The constitutional underpinnings of the Fifth Amendment preclude such a choice. The false statement statute was not designed to compel persons suspected of crimes to assist criminal investigators in establishing their guilt. *U.S.* v. *Cogdell*, 844 F.2d at 185 (4th Cir. 1988).

The Eighth Circuit in *U.S.* v. *Taylor*, 907 F.2d 801 (8th Cir. 1990), adopted the original reasoning of the Sixth Circuit in Steele and acknowledged that the "exculpatory no" doctrine appears to be anchored in the Fifth Amendment. The Eighth Circuit then stated that the "exculpatory no" doctrine is a narrow yet salutory limitation on a criminal statute, which, because of its breadth, is subject to potential abuse.

The *Steele* case highlights the overreaching that is permitted under the false statement statute if it is not limited by the use of the "exculpatory no" defense. That defense provides a balance between the acknowledged widespread application of the false statement statute and an individual's right against self-incrimination. The Fourth Circuit Court of Appeals in *U.S.* v. *Cogdell*, 844 F.2d at 183 stated as follows:

> Exculpatory denials made to an officer conducting a criminal investigation were never intended to be within the reach of § 1001. Without the legislative history supporting this interpretation, a criminal prosecution for denying guilt to a law enforcement officer is offensively close to a prosecution for a statement protected by the consitutional privilege against self-incrimination.

Accordingly, the "exculpatory no" doctrine has become a prophylactic which provides a balance between aggressive federal law enforcement and an individual's Fifth Amendment rights. This court should put its imprimatur on the "exculpatory no" doctrine and clarify the state of the law as to the reach and scope of the false statement statute.

### 3. WHERE THE TRIAL COURT INSTRUCTED THE JURY THAT AN OMISSION AS TO GROSS INCOME ON THE FILING OF A FEDERAL TAX RETURN WAS MATERIAL AS A MATTER OF LAW, THIS CONSTITUTES AN UNCONSTITUTIONAL DENIAL OF STEELE'S RIGHT TO A JURY TRIAL.

The Court in this matter instructed the jury that in order to find Steele guilty of making and subscribing to false statements on tax returns under Count II, (the 1065 Partnership Return), and Count III (the 1040 Individual Income Tax Return) that the Government must prove *inter alia* the following essential elements beyond a reasonable doubt: (See Jury Instruction 4003) (Appendix C).

> *Third*, that this tax return was false as to a material matter.

However, the jury was then instructed in regards to the element of materality as follows: (Jury Instruction 4007)

> The materiality of the statements made on Mr. Steele's tax return which he allegedly believed to be false is not a matter with which you, the jury, are to be concerned, *but rather is a question for the Court to decide. You are instructed that statements or omissions as to gross income constitute material matters.* (Emphasis added) (App. D)

Despite the fact that Steele had shown that the unreported sums had no tax consequences, the jury was instructed as a matter of law that the materiality element as to Counts II and III of the indictment was established. The instruction by the Court as to materiality was an unconstitutional denial of Steels's Sixth Amendment rights to have each and every element of the offense determined under the standard of proof beyond a reasonable doubt by a jury of his peers. (See *In re Winship*, 397 U.S. 358 (1970); *Francis* v. *Franklin*, 471 U.S.

307 (1968); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979)). Steele objected to the failure of the court to instruct the jury on the materiality element, but his objection was overruled. See *U.S.* v. *Mentz*, 842 F.2d 315, 324 (6th Cir. 1988) where the Sixth Circuit stated as follows:

> *Rose* v. *Clark* stands for the proposition when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless. In that event, the jury is prevented from carrying out its historic duty of finding beyond a reasonable doubt the fact supporting every essential element of the offense. The harmless-error doctrine may enable a court to remove a taint from proceedings in order to preserve a jury's findings, but it cannot constitutionally supplement those findings.

Accordingly, when the trial court directed a verdict on the essential materiality element under 26 USC § 7206(1) (Counts II and III of the indictment), it committed prejudicial error of constitutional dimensions by removing from the jury its obligation to weigh the facts on each and every element of the charge. (See *Carella* v. *California*, 109 S.Ct. 2419 (1989)).

Although this Court in *Kungys* v. *U.S.*, 485 U.S. 759 (1988) decided that the element of materiality in a proceeding was a legal issue, it has not considered it in reference to a criminal tax prosecution under 26 U.S.C. § 7206(1), where an omission from Petitioner's tax returns had no tax consequences to the government. This Court should conclude that an instruction on materiality as a matter of law is a conclusive presumption which violates Fifth Amendment and Sixth Amendment concerns and is unconstitutional, consistent with the doctrine enunciated in *In re Winship*, *supra*.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectively submitted,

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August, 1991

# APPENDIX

## APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,
v.
Robert L. STEELE,
Defendant-Appellant.

No. 87-4083.

United States Court of Appeals,
Sixth Circuit

Reargued Dec. 5, 1990.

Decided May 21, 1991.

Arnold Morelli (argued), Bauer, Morelli & Heyd Co. LPA, Cincinnati, Ohio, for defendant-appellant.

Robert C. Brichler, Asst. U.S. Atty., Cincinnati, Ohio, James A. Braton (argued), Robert E. Lindsay, Shirley D. Peterson, Washington, D.C., for plaintiff-appellee.

Before MERRITT, Chief Judge, KEITH, KENNEDY, MARTIN, JONES, KRUPANSKY, MILBURN, GUY, NELSON, RYAN, BOGGS, NORRIS, and SUHRHEINRICH, Circuit Judges, and BROWN and WELLFORD*, Senior Circuit Judges.

KENNEDY, Circuit Judge.

The issue presented to the en banc court is whether the sub-

* The Honorable Harry W. Wellford assumed senior status on January 21, 1991.

mission of false documents to the Internal Revenue Service by defendant, who was not a suspect, in response to an inquiry by an IRS agent during the course of a criminal investigation, is a prosecutable offense under 18 U.S.C. § 1001. Defendant urges us to adopt the judicially-created "exculpatory no" exception adopted by several other circuits to limit the application of section 1001. We decline to apply the doctrine to the facts in this case and find it unnecessary to decide whether the doctrine is viable in other circumstances.

I.

A.

Robert Steele ("defendant") was indicted and subsequently convicted on four counts: conspiring to defraud the Internal Revenue Service ("IRS") in violation of 18 U.S.C. § 371; filing a false 1981 U.S. Partnership Income Tax Return in violation of 26 U.S.C. § 7206; filing a false 1981 Form 1040 Individual Income Tax Return in violation of 26 U.S.C. § 7206(1); and knowingly submitting false documents to the IRS in violation of 18 U.S.C. § 1001. On appeal, this Court affirmed defendant's convictions on the first three counts but reversed his conviction based on 18 U.S.C. § 1001. *United States* v. *Steele*, 896 F.2d 998 (6th Cir. 1990). This Court then granted the government's petition for a rehearing en banc thus vacating the opinion and judgment of the appellate panel. However, no member of the en banc court has any disagreement with the panel's affirmance of the first three counts. The Court therefore adopts the panel's opinion on the issues related to those counts.

B.

Defendant, a certified public accountant and member of an accounting firm, devoted most of his time to various business interests, including construction, oil and gas exploration, motel operations and residential developments. In May 1981, defendant formed a partnership, called Woodland

Heights, with his wife, his accounting partner, Danny Pelphrey, and Pelphrey's wife. The partnership acquired a tract of land for the purpose of subdividing it and selling the parcels. In June 1981, defendant met with Thomas Duerr ("Duerr") to discuss the sale of two parcels of the subdivided tract. Duerr agreed to pay defendant $40,000 per parcel, but noted that this would create problems with the IRS because he derived his income illegally — selling controlled substances — and his income tax returns showed an annual income between $12,000 and $15,000. In light of this problem, defendant and Duerr agreed upon a purchase price of $40,000 per parcel, but the sales documents were drafted to reflect a purchase price of $20,000 per parcel. None of these documents revealed the full $80,000 purchase price for the parcels. Duerr made payments according to the terms of these sales contracts and paid defendant $40,000 cash. Defendant paid $19,500 of this cash payment to the Pelphreys as their share of the proceeds from the sale and kept $20,500 himself.

On March 22, 1982, defendant filed a U.S. Partnership Tax Return for the taxable year 1981 on behalf of the Woodland Heights partnership. Defendant did not report the $40,000 cash payment from Duerr as partnership income. Nor did defendant report his share of the $40,000 payment on his personal income tax return.

In August 1985, Duerr was indicted on various drug charges. At this time the IRS was investigating Duerr for possible fraudulent evasions of tax liability. IRS Special Agent Hall ("Hall") called defendant on two occasions. On the second occasion in early November, Hall explained the nature of the investigation againt Duerr and requested information concerning the purchase of the two parcels of land by Duerr from Woodland Heights in 1981. Defendant was not a suspect in this investigation.[1] Defendant told the agent that he had to

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[1] Agent Hall contacted Steele on two separate occasions. Hall, when asked the reason for initially contacting Steele, testified "that at that time

go out of town but that he would send Hall copies of all documents relating to the sale of this property.

Immediately thereafter, defendant met with Duerr. Defendant described Hall's visit and requests, and sought assurances from Duerr that he would represent that the transaction occurred as reflected in the false sales documents. Upon receiving these assurances from Duerr, defendant told Duerr that he would send the documents to Hall and thereafter avoid contact with the agent. Defendant thereupon sent the documents which are the basis of the section 1001 count to Hall.

Duerr subsequently cooperated with the government, disclosing the fraudulent nature of the land transactions conducted between himself and defendant. Had Duerr not supplied this information it was unlikely that the IRS would have learned the true amount of the transaction.[2]

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we were investigating Mr. Duerr's finances" and that he recontacted Steele in order to get information to present the case against Duerr to the jury if Duerr did not plead guilty. Hall testified that even when he received the records he did not know that the $30,000 recited in the documents, part of the payment for the properties, was in cash. From this it is fair to infer that he did not yet have Duerr's confession implicating defendant. Moreover, the exculpatory no issue in the District Court was raised by motion at the close of the government's case. During argument on the motion, the Assistant United States Attorney represented to the District Court that Steele was not the target of any investigation. The statement was not challenged. Thus, there is no evidence in the record that Steele was the target of any investigation when he was contacted on either occasion and the evidence in the record indicates that a different purpose led to these contacts.

[2] In his testimony, Agent Hall negated the possibility of discovering the fraudulent nature of this transaction through investigative means exclusive of Duerr's confession. Agent Hall stated that Steele's and the partnership's federal tax returns were unhelpful. Similarly, the documents involved in this transaction, including the partnership's deposit slip, the cognovit notes, the cashiers' checks given to the partnership by Duerr, and the land contracts and deed publicly on file, provided no means of uncovering the instant fraud. Indeed, Agent Hall testified that the documents given by Steele to Hall are consistent with the $40,000 purchase price allegedly paid by Duerr for the two parcels. Given the breadth of Hall's testimony on this sub-

## II.

### A. Section 1001

The language of section 1001 is the starting point for our analysis. *See United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). Any limitation imposed on the application of this section — whether we label it an "exculpatory no" exception or something else — must result from an analysis of the statutory language and legislative history in light of accepted canons of statutory construction. The plain meaning of the statute controls our interpretation, "except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,' " *id.* at 242, 109 S.Ct. at 1031 (quoting *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982)); *Bradley* v. *Austin*, 841 F.2d 1288 (6th Cir. 1988), or when the statutory language is ambiguous, *Blum* v. *Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). We are also mindful that this is a criminal statute, and as such, it will be strictly confined within the fair meaning of its terms. *But see United States* v. *Bramblett*, 348 U.S. 503, 510, 75 S.Ct. 504, 508, 99 L.Ed. 594 (1955) (stating that this canon of construction "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature").

18 U.S.C. § 1001 states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or

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ject, it is reasonable to infer that the fraud would have gone undiscovered without the aid of Duerr.

> document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The Supreme Court has noted that this language is broad — applying to *any* matter within *any* department or agency — and has rejected the limitation adopted by the Eighth Circuit to exclude statements made to the FBI because the FBI lacked jurisdiction to dispose of the problem. *United States* v. *Rodgers*, 466 U.S. 475, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984). The Eighth Circuit concluded that the phrase " 'within the jurisdiction' " referred to " 'the power to make final or binding determinations.' " *Id.* at 477, 104 S.Ct. at 1945 (quoting *Friedman* v. *United States*, 374 F.2d 363 (8th Cir. 1967)). The FBI therefore lacked jurisdiction because it had " 'no power to adjudicate rights, establish binding regulations, compel the action or finally dispose of the problem giving rise to the inquiry.' " *Id.* at 478 (quoting *Friedman*, 374 F.2d at 368). The Supreme Court disagreed with this construction and concluded that this term should not be given " 'a narrow or technical meaning.' " *Id.* 466 U.S. at 480, 104 S.Ct. at 1946 (quoting *Bryson* v. *United States*, 396 U.S. 64, 70, 90 S.Ct. 355, 359, 24 L.Ed.2d 264 (1969)). The "jurisdiction" of section 1001 is co-extensive with the statutory basis for the authority of an agency — in the case of *Rodgers*, the FBI — to conduct an investigation triggered by a defendant's false statements. Such a construction is in keeping with Congress' purpose to protect the "myriad governmental activities." *Id.*[3] Accordingly, the language of section

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[3] The Court also rejected the Eighth Circuit's attempt to limit the application of section 1001 by reliance on the social policy of open communication by the public to the FBI. The Court concluded that " 'individuals acting innocently and in good faith, will not be deterred from voluntarily giving information or making complaints to the F.B.I.' " *Rodgers*, 466 U.S. at 483, 104 S.Ct. at 1948 (quoting *United States* v. *Adler*, 380 F.2d 917, 922 (2d Cir.), *cert. denied*, 389 U.S. 1006, 88 S.Ct. 561, 19 L.Ed.2d 602 (1967)).

1001 and *Rodgers* do not limit the scope of this statute; rather, both counsel for a broad reading. *Id.* at 484, 104 S.Ct. at 1948 (stating that "[r]esolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress").

The legislative history does not communicate a congressional intent to restrict the scope of section 1001. The origin of section 1001 is discussed in *Bramblett*, 348 U.S. at 503, 75 S.Ct. at 505. Its predecessor originally covered false claims against the government by military personnel. False statements made for the purpose of obtaining the approval of such claims were also prohibited. Later, the statute was extended to include all false claims made for the purpose of cheating or defrauding the government of the United States as well as false statements for obtaining payment of a false claim. In 1934, the Secretary or the Interior sought an amendment so that he could prosecute "hot oil" frauds — frauds perpetrated by petroleum producers through falsification of interstate shipment documents but which involved no pecuniary or property loss to the government. *United States* v. *Gilliland*, 312 U.S. 86, 92, 61 S.Ct. 518, 522, 85 L.Ed. 598 (1941). This amendment implemented the congressional intent to expand the scope of the statute "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *Id.* at 93, 61 S.Ct. at 523. In 1948, the statute took its present form. False claims were severed and are covered by section 287; the false statements provisions were incorporated into section 1001. Hence, the legislative history communicates a congressional intent to expand, not limit, the scope of section 1001. In light of this congressional intent, a broad reading of section 1001 would not arrive at a result "demonstrably at odds" with congressional intent; to the contrary, the Court has consistently indicated that the statute should be construed broadly. *See Bramblett*, 348 U.S. at 503, 75 S.Ct. at 505 (stating that "[t]here is no indication in either the committee reports or in congressional debate that the scope of [section 1001] was to be in any way restricted").

In its present form, section 1001 consists of three operative clauses: the first clause prohibits a misstatement of "material" fact; the second clause prohibits a false "statement" or "representation"; and the third clause prohibits false writings containing a false "statement" or "entry." A literal application of this statute requires a finding of materiality in the first clause, and a finding of a "statement" in the second and third clauses with no requirement of materiality. In keeping with prior caselaw, we choose to read the requirement of materiality into all of the clauses so as " 'to exclude trivial falsehoods from the purview of the statute.' " *United States* v. *Chandler*, 752 F.2d 1148, 1151 (6th Cir. 1985) (quoting *United States* v. *Abadi*, 706 F.2d 178 (6th Cir. 1983)); *United States* v. *Beer*, 518 F.2d 168 (5th Cir. 1975); *United States* v. *Stark*, 131 F.Supp. 190 (D.Md. 1955).[4] Accordingly, five elements comprise the section 1001 offense: (1) the defendant made a statement; (2) the statement is false or fraudulent; (3) the statement is material; (4) the defendant made the statement knowingly and willfully; and (5) the statement pertained to an activity within the jurisdiction of a federal agency. *Chandler*, 752 F.2d at 1150.[5]

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[4] Defendant argues that a distinction should be made between written and oral statements for purposes of section 1001 analysis. The Supreme Court has held, however, that there is no distinction between written and oral statements under this section, *United States* v. *Bramblett*, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955), thereby making the interpretation of "statement" equally applicable to all three operative clauses.

[5] The dissent states that the majority opinion fails to specify defendant's criminal conduct and then proceeds to assume incorrectly that we consider it to be "the act of sending documents to Agent Hall. . . ." The dissent attacks this interpretation imputed to the majority because it fails to account for the statutory term "use." According to the dissent, to "use" a writing, and thus violate section 1001, a defendant must make a representation, either explicitly or implicitly, that a document is correct as to the assertions it makes. The dissent argues that no such representation was made in this case; defendant simply sent the requested documents without making any representations.

A statement is material for purposes of section 1001 if it has a "natural tendency to influence, or be capable of affecting or influencing," a function entrusted to a governmental agency. *United States* v. *McGough*, 510 F.2d 598, 602 (1975); *Chandler*, 752 F.2d at 1151. It is not necessary to show that the statement actually influenced an agency, but only that it had the capacity to do so. *McGough*, 510 F.2d at 602; *Chandler*, 752 F.2d at 1151. A materiality determination is subject to *de novo* review on appeal. *Chandler*, 752 F.2d at 1151.

Here there can be little doubt as to the materality of the false statements in the documents defendant gave to the IRS. Hall's testimony indicates that had it not been for Duerr's cooperation, the IRS would have accepted them as true. They were the type of documents on which the IRS would be likely to rely. They were not spontaneous emotional disclaimers uttered by a suspect to which an experienced investigator would give little credence and on which one would be unlikely to rely. They were provided after a period of deliberation during which defendant discussed his plan of deception with his co-conspirator Duerr. The documents were calculated to in-

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The dissent interprets too narrowly both the majority opinion and section 1001. In our view, a defendant "uses" a writing in a manner proscribed by section 1001 when all of the elements of this section are proven: knowingly and willfully submitting a false and material document to an agency on a matter that is within the jurisdiction of such agency. Subsumed in the elements cited by the majority, particularly the mens rea and materiality elements, is the requirement that such conduct amount to a representation to an agency regarding a document's veracity. Inherent in the finding that a document is "material" is the conclusion that a document, based either on its own characteristics or surrounding circumstances, makes a representation and possesses indicia of reliability as to its veracity. The dissent is incorrect to the extent that it would require proof of an additional element beyond those enumerated in the majority opinion, that is, that a defendant must intend to or actually represent to an agency that the facts contained in the submitted documents are correct. Our reading of the elements required to prove a section 1001 violation addresses the concerns raised by the dissent and renders superfluous proof of this additional requirement.

fluence and were likely to influence the action of the IRS. The function of the IRS to collect Duerr's taxes would be impaired if the documents were accepted as accurate representations of the parties' transaction. The requirement of materiality is met under these circumstances.

B. The Exculpatory No Exception

Defendant argues that the "exculpatory no" exception is a necessary limitation upon the broad scope of section 1001, and as applied to the facts of the instant case, this exception exonerates him. The exculpatory no exception appears to have been first adopted by a court of appeals in *Paternostro* v. *United States*, 311 F.2d 298 (5th Cir. 1962). That court noted that defendant "did not aggressively and deliberately initiate any positive or deliberate statement calculated to pervert the legitimate functions of government" and concluded that section 1001 did not apply. *Id.* at 309. Defendant was accused of making false statements to an IRS agent investigating unreported income from police graft. He gave negative answers to a number of questions. Following earlier district court opinions that concluded such negative answers were not statements within the contemplation of section 1001, *id.* at 302-03, the *Paternostro* court dismissed that count of the indictment. On rehearing, the court restated its holding that "the 'exculpatory no' answer without any affirmative, aggressive or overt misstatement on the part of defendant does not come within the scope of the statute. . . ." *Id.* at 309. Later Fifth Circuit cases stated that the doctrine was based both on the purpose of the statute and the fifth amendment right against self-incrimination. The Fifth Circuit held therefore that the doctrine did not apply when a person attempts to affirmatively mislead a government investigator. *Id.* at 298. Defendant does not contend he could come within *Paternostro's* exception that a simple "no" answer is not a statement. Thus we need not decide the applicability of the statute to that situation.[6]

[6] The First Circuit in dicta also has approved an exception for mere

Defendant urges this Court to adopt the exculpatory no exception established by the Ninth Circuit, *see United States* v. *Equihua-Juarez*, 851 F.2d 1222 (9th Cir. 1988), and adopted by the Fourth Circuit in *United States* v. *Cogdell*, 844 F.2d 179 (4th Cir. 1988). This test consists of five parts:

> 1) the false statement must be unrelated to a claim to a privilege or a claim against the government;
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> 2) the declarant must be responding to inquiries initiated by a federal agency or department;
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> 3) the false statement must not impair the basic functions entrusted by law to the agency;
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> 4) the government's inquiries must not constitute a routine exercise of administrative responsibility; and
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> 5) a truthful answer would have incriminated the declarant.

*Equihua-Juarez*, 851 F.2d at 1224.

We decline to adopt this test for several reasons. First, some of the criteria are based on rationales which we are unable to

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negative responses to government inquiries in *United States* v. *Chevoor*, 526 F.2d 178 (1st Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed.2d 176 (1976). It reasoned the "negative, oral responses to the questioning. . . . were not 'statements' within the meaning of 18 U.S.C. § 1001." *Id.* at 184. The Second Circuit, in declining to apply the exception where defendant made affirmative representations, stated that if it did not adopt the exception, "we would construe it narrowly, ruling that any statement beyond a simple 'no' does not fall within the exception." *United States* v. *Capo*, 791 F.2d 1054, 1069 (2d Cir. 1986) (citations omitted). The principle underlying this exception is that a simple negative response cannot serve as proof of the requisite knowledge and willfulness required to convict under section 1001 absent affirmative steps by the government to make reporting requirements known. *See United States* v. *King*, 613 F.2d 670, 675 (7th Cir. 1980) (distinguishing *United States* v. *Bush*, 503 F.2d 813 (5th Cir. 1974), because defendant did not merely give simple negative exculpatory answers and defendant initiated the contract with the government).

accept. For example, the fourth and fifth criteria are premised on fifth amendment concerns. While no court has held that section 1001 violates the fifth amendment, these criteria purportedly safeguard against the application of section 1001 in circumstances which come "uncomfortably close" to violating the fifth amendment. *United States* v. *Alzate-Restreppo*, 890 F.2d 1061 (9th Cir. 1989) (Patel, J., and Nelson, J., concurring in the judgment); *United States* v. *Myers*, 878 F.2d 1142, 1144 (9th Cir. 1989); *United States* v. *Tabor*, 788 F.2d 714 (11th Cir. 1986); *United States* v. *Rose*, 570 F.2d 1358, 1364 (9th Cir. 1978). This rationale assumes that section 1001 creates a Hobson's choice for an individual: admit guilt or be charged with a felony offense. *See Cogdell*, 844 F.2d at 185 (stating that "[t]he statute . . . was not intended to compel persons suspected of crimes to assist criminal investigators in establishing their guilt").

Fifth amendment concerns, however, fail to justify the fourth and fifth criteria of this test. An individual has a constitutional privilege against self-incrimination, but he has no constitutional right to give an untruthful statement. *Bryson* v. *United States*, 396 U.S. 64, 74, 90 S.Ct. 355, 361, 24 L.Ed.2d 264 (1969) (stating that "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood"); *Cogdell*, 844 F.2d at 186 (Wilkins, J., dissenting in part). The Hobson's choice posited by some courts applying this exception is flawed; an individual need not assist an investigating officer or face felony charges. A third option is available to an individual: remain silent and invoke the fifth amendment privilege against self-incrimination, *id.* at 187 (Wilkins, J., dissenting in part), or here, simply not mail the documents. While we acknowledge the canon of construction that allows a court to construe a statute so as to avoid a constitutional infirmity, *DeBartolo Corp.* v. *Florida Gulf Bldg. & Constr. Trades Council*, 485 U.S. 568, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988), a statute that comes "uncomfortably close" to a constitutional violation does not trigger the application of this canon.

We also conclude that the fourth criterion fails to account for the Supreme Court's guidance in *Rodgers*. The Supreme Court expressly recognized that "[a] criminal investigation surely falls within the meaning of 'any matter' . . . ." *Rodgers*, 466 U.S. at 479, 104 S.Ct. at 1946. Thus, a distinction between an agency's administrative and investigative functions is unwarranted. There is no reason to undertake the superfluous analysis required by the fourth prong of this test because section 1001 applies to all agency actions, criminal or otherwise.[7] *See United States* v. *Payne*, 750 F.2d 844, 863 n. 21 (11th Cir. 1985) (rejecting the administrative/investigative distinction because it is unhelpful).

In sum, we share the concerns of other courts concerning the sweeping language of section 1001. As one court noted, "[I]f read literally, [this statute] could make 'virtually any false statement, sworn or unsworn, written or oral, made to a Government employee . . . a felony.' " *United States* v. *Medina de Perez*, 799 F.2d 540, 543-44 (9th Cir. 1986) quoting

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[7] Some Ninth Circuit panels have begun to question the usefulness of this multi-part test. *See Alzate-Restreppo*, 890 F.2d at 1068 (Patel, J., and Nelson, J., concurring in the judgment) (stating that the five-prong test is "cumbersome" and that it "is unnecessary and distortive"). Judge Patel suggests an analysis based on "whether, at the time of the statement, there was reasonable cause to detain or probable cause to arrest the defendant or whether he was the subject of a criminal investigation." In such circumstances, which implicate fifth amendment concerns, a negative response should not violate section 1001. *Id.* at 1069-70. However, fifth amendment concerns have led courts to reach different conclusions. *Compare United States* v. *King*, 613 F.2d 670 (7th Cir. 1980) (holding that the exculpatory no exception did not apply once defendant had been read his *Miranda* rights, an act informing him that he was under investigation) *with Alzate-Restreppo*, 890 F.2d at 1069 (Patel, J., and Nelson, J., concurring in the judgment) (discussing cases which have held that the exculpatory no exception applies only when a defendant has been read his *Miranda* rights).

We also observe that the third criterion appears superfluous in light of the requirement of materiality. As one judge noted, "[s]ince materiality is a critical element of [section 1001], this [third criterion] seems redundant." *Alzate-Restreppo*, 890 F.2d at 1068 (Patel, J., and Nelson, J., concurring in the judgment).

*United States* v. *Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972)). Yet, we do not think these concerns legitimize the creation of the Ninth Circuit's broad exception of this statute. The statute does contain language which reasonably limits its application; only "material" statements are violations. The false documents here were clearly material to ascertaining the tax liability of Duerr. He was using the false price of the lots to conceal a substantial amount of income. Unlike the mere denial of guilt by a suspect, the government would be very likely to rely on the documents submitted by defendant.

Besides this statutory language, Congress appears to have relied primarily upon the discretion of a prosecutor in limiting the potential application of this section. This mechanism — Prosecutorial discretion — is a valid means of limiting the potential application of a statute. It is not our role to re-write a statute simply because we are discomforted by the manner in which Congress chose to structure its enforcement *United States* v. *Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (stating that "establishment of different policies for the governmental agencies affected [in order to curb overzealous application of section 1001] is in the executive and legislative rather than the judicial domains"); *cf. United States* v. *Schmoker*, 564 F.2d 289, 292 (9th Cir. 1977) (Hufstedler, J., concurring specially) (stating that "the court is forbidden to intervene when the choice of charges is legally committed to the prosecutor").

C. Timing of Statement

Defendant also argues that the documents were not false statements since they were the documents drawn up at the time of the transactions. However, the statute speaks of documents or writings which contain "any false . . . statements . . . or entry." These documents contained false entries. They recited a purchase price and payments which did not reflect the actual transaction, but which falsely purported to do so. These statements subsequently were submitted to the IRS by defendant. Hence, these statements fall within the purview of section 1001.

III.

For the foregoing reasons we AFFIRM the judgment of the District Court.

DAVIS A. NELSON, Circuit Judge, concurring.

I concur in the body of the majority opinion, but footnote five prompts me to add a word of explanation as to the point at which I part company with the dissenters.

The dissent suggests that there could have been no violation of the statute without at least an implied representation to Agent Hall that the documents were correct — and the dissent asserts that, "in fact, the defendant did not . . . imply that they were correct." I agree that an implied representation was required, but it seems to me that such a representation was, in fact, made. The defendant agreed to put a false price in the sales documents with a view to misleading anyone who read the documents, and in sending the false documents to Agent Hall, as the jury must have found, the defendant intended to mislead Agent Hall. I think the record amply supports the conclusions (1) that the defendant falsified a material fact, (2) that he did so by making a false representation, and (3) that he used a false document in the process. On the record before us, in my opinion, the defendant's use of the false document constituted a violation of all three of the operative clauses of the statute.

WELLFORD, Senior Circuit Judge, concurring:

I fully agree with the principles enunciated by the majority in this case. I write separately, however, to indicate that under no circumstances should we apply the "exculpatory no" exception to a case in which the person seeking the benefit of this doctrine was not under investigation when the relevant statement was made.

I agree that the "exculpatory no" doctrine's links to Fifth Amendment concerns are weak. Even if I were to accept this rationale for the doctrine, the Fifth Amendment normally applies only when the individual claiming the right is the *sub-*

*ject* of the interrogation. *Cf. Miranda* v. *Arizona*, 384 U.S. 436, 477, 86 S.Ct. 1602, 1629, 16 L.Ed.2d 694 (1966) ("Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding.") (citation omitted); *see also Rhode Island* v. *Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). The "exculpatory no" doctrine, even if it were legitimately grounded on Fifth Amendment concerns, should have no application in a case such as this since the defendant here was not a suspect at the time he was questioned. *United States* v. *Myers*, 878 F.2d 1142, 1144 (9th Cir. 1988).

In this case the jury had clear evidence that Steele himself helped draft or make, through a scheme with Duerr, a false statement and representation about a sale of property, and then furnished this intentionally false information to IRS agent Hall for the purposes of concealing tax consequences to himself and others. We do not decide the issue in this case as to whether Steele may have been liable for furnishing the known false documentation, which he himself helped to draft, to IRS for the sole purpose of protecting others to avoid substantial tax liability. This case involves his attempt to conceal his own fraud and to protect another as well.

In my view, under the circumstances of this case, Steele at least indirectly represented to agent Hall that the documents he furnished accurately described the land transaction. There is no evidence, contrary to mere speculation and surmise, that Hall had any basis himself to know, or even to suspect, that the information furnished was false and fraudulent. There was no evidence that Hall "suspected" Steele at the time to be a deceiver, a fraud participant, and a tax evader. The dissent contends that the "important question should be whether he [Steele] *thought* he was a suspect," but no authority is cited for this proposition. I conclude this is not determinative; rather, the important question is whether Steele by his actions intended to deceive the investigating agent.

Steele's offense under the statute was to falsify and conceal a material fact in an IRS investigation of another person, and to make a knowing false statement or representation in the documentation of a sale. This activity comes within the proscribed language of § 1001 and encompasses the *use* of the false writing.

The dissent virtually acknowledges that its proposed adoption of the "exculpatory no" doctrine would "eliminate situations" through judicial redrafting of § 1001 based on its assumption that Congress did not, despite its use of the broad language, intend to criminalize this type of fraudulent conduct. As stated by Judge Kennedy, "[i]t is not our role to rewrite a statute simply because we are discomforted" by congressional language.

BAILEY BROWN, Senior Circuit Judge.

We respectfully dissent.

I

The overall thrust of the majority opinion is twofold: first, that applying the "plain meaning" of 18 U.S.C. § 1001, the evidence supports a conviction of the defendant, Steele, of a violation of that provision; and second, that without deciding whether some formulation of the "exculpatory no" doctrine could be acceptable, the formulation of the doctrine relied upon by defendant and applied in the Ninth and Fourth Circuits[1] is not acceptable and cannot be applied in this case.

On the contrary, it appears to us that, giving effect to section 1001 by its terms, the evidence does not support a conviction of defendant and that, in any event, the "exculpatory no" doctrine as applied in the Ninth Circuit and Fourth Circuit, should be adopted by this court and applied in this case.

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[1] *United States* v. *Equihua-Juarez*, 851 F.2d 1222 (9th Cir. 1988); *United States* v. *Cogdell*, 844 F.2d 179 (4th Cir. 1988); *United States* v. *Medina de Perez*, 799 F.2d 540 (9th Cir. 1986).

II

We agree with the majority opinion's statement of the rules of statutory interpretation and application. "Plain meaning" controls unless this will create a result clearly contrary to the intent of those who drafted the statute. We also agree with the majority opinion's summary of the legislative history and agree that, section 1001 being a criminal statute, it must be "construed strictly." *United States* v. *Bramblett*, 348 U.S. 503, 509, 75 S.Ct. 504, 508, 99 L.Ed. 594 (1955). We further agree with the majority opinion that, under the holding in *United States* v. *Rodgers*, 466 U.S. 475, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984), the Internal Revenue Service is a "department or agency of the United States" within the meaning of section 1001, and defendant has not contended otherwise.

III

A.

The majority opinion, nevertheless, recognizes that the meaning of section 1001, on its face, is not so plain. It states that the provision has:

> [T]hree operative clauses: the first clause prohibits a misstatement of "material" fact; the second clause prohibits a false "statement" or "representation"; and the third clause prohibits false writings containing a false "statement" or "entry." A literal application of this statute requires a finding of materiality in the first clause, and a finding of "statement" in the second and third clauses with no requirement of materiality. In keeping with prior caselaw, we choose to read the requirement of materiality into all of the clauses so as ' "to exclude trivial falsehoods from the purview of the statute." ' (Citations omitted.)

We agree that, under the statute, only "material" statements or representations or writings could be a basis for a

violation of section 1001 and further agree that the documents mailed to IRS Agent Hall were "material" to his investigation.

The majority opinion then concludes that the elements of a section 1001 offense are as follows:

> Accordingly, five elements comprise the section 1001 offense: (1) the defendant made a statement; (2) the statement is false or fraudulent; (3) the statement is material; (4) the defendant made the statement knowingly and willfully; and (5) the statement pertained to an activity within the jurisdiction of a federal agency. (Citations omitted.)

B.

At this point, it should be recognized that the majority opinion never specifies the conduct of the defendant that was, applying its definition of elements of the crime, a substantive violation of section 1001. We assume that it is not intended to hold that the mere act of having the documents prepared by counsel and executed by the parties was a violation of section 1001, although the documents were prepared at Duerr's request to cover up Duerr's income and therefore arguably "pertained to an activity within the jurisdiction of federal agency." We also assume that the majority opinion does not consider the criminal conduct to be defendant's act of sending the documents to Agent Hall knowing them to be incorrect *and* expressly or impliedly representing to Hall that the documents were correct. We assume this because the majority opinion does not rely on any such expression or implication from the defendant to Hall and because, in fact, the defendant did not express or imply that they were correct. Defendant only agreed to send to Hall the documents that he had in his file and so stated in the letter to Hall that accompanied the documents.[2] We therefore assume that it is the intent of

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[2] The letter states only: "Dear Mr. Hall: Enclosed you will find copies of all the documents which we have in our possession regarding Thomas R. Duerr."

the majority opinion to hold that the act of sending the documents to Agent Hall, at Hall's request, knowing them to be false, was, *ipso facto*, the criminal act.

The only language in the statute that could possibly criminalize the act of sending the false documents to Agent Hall, knowing them to be false, at Hall's request, is that part which states: "Whoever, in any matter within the jurisdiction of any department or agency of the United States . . . *uses* any false writing or document knowing the same to contain any false . . . statement. . . ." (Emphasis added.) The operative word is "uses." If it cannot fairly be said that defendant 'used" the documents when he mailed them to Hall, his act was not criminal. Defendant did not "use" the documents. It was Agent Hall, who desired to see the documents, who contacted defendant by telephone and caused them to be sent to him. It is true that defendant avoided an interview with Hall, but the fact remains that defendant merely complied with Hall's request to supply copies of the documents in defendant's file.

It appears to us that it is an unreasonable interpretation of section 1001, in the light of the legislative history,[3] to hold that the supplying of a document, at the request of a government agency, that is known to be false is, *ipso facto*, a crime under section 1001. Under the majority opinion, the defendant would have violated section 1001 even if, for example, he had had no interest in the land sale to Duerr and had had no part in the preparation of the documents but, as Duerr's accountant, had had possession of the documents, knew that they were false, and had mailed them to Agent Hall at Hall's request.

It was Agent Hall who initiated the contract, not defendant, and defendant did not represent to Agent Hall that the

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[3] As is recognized by the majority opinion, the last substantive amendment to this statute in 1934 was induced by the practice of filing false documents covering shipment of oil in commerce but which caused no loss to the government. It had nothing to do with documents not required to be filed and are furnished to the government at the government's request.

documents accurately described the land transaction. Moreover, it was Agent Hall's desire to use the documents, not defendant's, that was the reason for their delivery to Hall. The majority opinion cites no case in which section 1001 was applied in the same or similar situation to this one, and the legislative history set out in the majority opinion does not support such an application of section 1001.[4]

The majority opinion appears to recognize, without relying on the doctrine of "exculpatory no," that conduct that would be covered by the "plain meaning" of the statute is not criminalized. The opinion states: "They [i.e. the statements in the documents sent to the IRS] were not spontaneous, emotional disclaimers uttered by a suspect to which an experienced investigator would give little credence and on which one would be unlikely to rely." We agree with the implication that such conduct is not criminalized by section 1001 because, in the light of the legislative history and the concerns Congress intended to meet, it is highly unlikely that Congress intended to criminalize such conduct. We also believe, however, that the same result would follow for the same reason if a disclaimer were neither spontaneous nor emotional.

The majority opinion agrees with the statement in *United States* v. *Medina de Perez*, 799 F.2d 540, 543-44 (9th Cir. 1986) (quoting *United States* v. *Bedore*, 455 F.2d 1109, 1110 (9th Cir. 1972), that "if read literally, [this statute] could make 'virtually any false statement, sworn or unsworn, writ-

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[4] In concurring in the majority opinion, Judge Wellford and Judge Nelson agree that the defendant "used" the documents only if he impliedly represented to Agent Hall that the documents correctly stated the facts of the transaction and only if his reason for sending the documents to Hall was personal. It seems to us that there was no implication of correctness here as there would not have been had defendant submitted these partnership documents pursuant to a subpoena. Moreover, the evidence is that the documents would not have been sent by defendant to Hall but for the fact that Hall asked for them. This is a criminal statute, and it is contrary to accepted doctrine to stretch it to cover this fourth count of the indictment.

ten or oral, made to a Government employee . . . a felony.' " The answer to this obvious problem in applying the statute is, acording to the majority opinion, not that we narrow its application in accordance with legislative history, but rather that we rely on the prosecutors to wisely exercise their discretion and not bring some cases that are covered by the "plain meaning" of the statute. This appears to us to be an ineffective and inappropriate substitute, in this context, for the application of the accepted principle of a strict interpretation of this criminal statute in the light of its legislative history.

IV

It is the position of the government that defendant was not a "suspect"when he was contacted by Agent Hall and, at Hall's request, supplied him with copies of the documents. In support of its position, the government in its original brief cited pages 41-45 of the transcript and in its brief for the en banc court cited government's exhibit 14 and pages 41-45 of the transcript. Exhibit 14 is the superseding criminal information filed against Duerr after Duerr agreed to cooperate; transcript pages 41-45 are part of the testimony of Duerr as a government witness. Neither this criminal information nor this testimony affords any support for the contention that defendant was not a suspect.

The majority opinion, however, finds other support for the government's contention that defendant was not a suspect when he was contacted by Hall and supplied the documents. The opinion states that it may be inferred that Duerr did not give information to the government until after defendant had supplied the documents to Hall. Even if this may be inferred, however, this does not rule out the possibility that the government had received some information from a source other than Duerr. For example, it appears that the defendant's then partner, Pelphrey who testified as a government witness in this case, had knowledge at the time of the transaction that the documents did not truthfully reflect it. Pelphrey testified that he knew at that time that the documents did not reflect

the $40,000 in cash that Duerr paid on the front end, and Pelphrey put his share of the cash ($19,500) in a safety deposit box. Pelphrey also knew that the partnership return did not reflect the cash payment; nevertheless, Pelphrey's personal return, he testified, did reflect the cash he received. Pelphrey told his wife about this at the time of the transaction. Tr. 263-302. Certainly Agent Hall never testified that neither he nor the IRS nor drug enforcement[5] had any information that implicated defendant until Duerr confessed.

The majority opinion also bases its inference that the defendant was not a suspect on the assertion that, during an argument to the trial court at the conclusion of the government's case, the prosecutor represented to the court that defendant was not a target and "The statement was not challenged." It is difficult, however, to see how defense counsel could have challenged a statement the truth of which only the government would know.

The majority opinion also states that, had Duerr not confessed, it was unlikely that Agent Hall or the IRS would have ever learned the true terms of this land sale. The opinion bases this inference on Hall's testimony that he could not have learned these terms from the defendant's personal tax return, the partnership tax return, and the documents supplied to him by defendant. However, there were other sources of this information such as, as we have stated, the defendant's partners in this land transaction, Pelphrey and Pelphrey's wife, and their personal income tax return on which their share of the cash was reported.

In any case, while the majority opinion does not specify whether defendant's not being a "suspect" undercuts his contention that section 1001 does not cover his conduct or his contention that the doctrine of "exculpatory no" applies, we assume that it is the latter. As will be seen, under the for-

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[5] As indicated by the majority opinion, pursuant to statues relating to illicit drugs, Duerr was originally indicted, along with several others, for conspiracy and substantive violations.

mulation of the doctrine that we would apply, his being or not being a "suspect" is not a part of the consideration.[6]

V

As is recognized by the majority opinion, the "exculpatory no" doctrine has been adopted by several circuits in various formulations but it is the formulation of the Ninth Circuit, and followed by the Fourth Circuit,[7] that was relied upon by defendant at trial and here. The majority opinion does not hold that the facts of this case do not fit this formulation, and clearly they do fit.[8]

The "exculpatory no" doctrine, as recognized by those circuits and as set out in the majority opinion, consists of five parts, each and all of which must be satisfied if a defendant is to be allowed to rely on the defense:

> 1) the false statement must be unrelated to a claim to a privilege or a claim against the government;
> 2) the declarant must be responding to inquiries initiated by a federal agency or department;
> 3) the false statement must not impair the basic functions entrusted by law to the agency;
> 4) the government's inquiries must not constitute a routine exercise of administrative responsibility; and
> 5) a truthful answer would have incriminated the declarant.

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[6] It appears to us that, if defendant's being a "suspect" should be a factor in the determination whether he can rely on the doctrine of "exculpatory no," the important question should be whether *he thought* he was a suspect, not whether the government considered him a suspect.

[7] *See, supra* note 1.

[8] At trial, the district court refused to charge the jury, as defendant requested, concerning defendant's defense based on "exculpatory no." Instead, the court simply charged the jury that plaintiff would be guilty under § 1001 if he "made and used . . . a false . . . document within the jurisdiction of a department or agency. . . ."

The majority opinion refuses to approve this formulation of "exculpatory no" because, it opines, the fourth and fifth criteria are, at least in part, wrongly based on fifth amendment concerns. We believe that to support this "exculpatory no" doctrine it is unnecessary to rely on fifth amendment concerns. We believe that the doctrine can and should be invoked for the reason that (as the majority opinion recognizes) if applied literally, section 1001 would criminalize as a felony every false statement, oral or written, sworn or unsworn, knowingly made to any federal government employee if the statement had to do with a matter within the jurisdiction of the employee's department. We do not believe that, in view of the legislative history, it was the intent of Congress to enact legislation that would sweep that broadly. It appears to us that the "exculpatory no" doctrine as it has evolved in the Ninth Circuit and followed in the Fourth Circuit, fairly eliminates situations that Congress never intended to criminalize. Moreover, by so applying this doctrine, the courts can avoid a case by case *ad hoc* consideration in making a determination whether section 1001, though appearing to apply to a defendant's conduct, actually applies.

The majority opinion also disapproves of this formulation of the "exculpatory no" doctrine because the fourth criterion permits the defense to be applied to criminal investigations but not to a "routine exercise of administrative responsibility." In *Rodgers*, the majority opinion points out, the Court held that section 1001 may be applied in the context of a criminal investigation. The answer to this concern is that, while the "exculpatory no" doctrine cannot be applied to a "routine exercise of administrative responsibility" and *may* be applied in the context of a criminal investigation, it cannot be applied to a criminal investigation unless the other four criteria are satisfied. That is to say, the holding in *Rodgers* that section 1001 was properly applied in the context of that criminal investigation does not infer that the doctrine of "exculpatory no" cannot be applied in the context of a criminal investigation where the other four criteria are met.

VI

For the reasons stated herein, we respectfully dissent.

MERRITT, Chief Judge, dissenting.

I concur in Judge Brown's dissenting opinion and add this comment with respect to footnote five in the majority opinion. This footnote relates to the dissenting opinion prepared by Judge Brown.

The majority opinion does now make clear that the crime committed here under section 1001 was the "use" of the false documents by mailing them to Agent Hall and impliedly representing that the documents accurately described the transaction. The majority opinion now further concludes that the finding that the documents were "material" amounted to a finding that defendant impliedly represented that the documents accurately described the transaction.[1] This is so, the opinion states, because the documents would not be "material" unless the defendant impliedly represented that the documents accurately reflected the transaction. It appears to me, however, that the documents would have been "material" even if defendant had expressly disavowed such a representation. In short, if defendant had added a sentence to his covering letter to Hall: "I do not represent that these documents accurately describe the transaction," there would, even more clearly, not have been a representation of accuracy and yet the documents would have been "material" to the investigation because they would relate to the investigation of the transaction.

Therefore, it seems to me that the finding of "materiality" does not, by inference, include a finding that the defendant impliedly represented that the documents accurately reflected the transaction. Moreover, and in any event, as is

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[1] The trial court determined that the question of materiality was for the court, not for the jury and the jury was charged that the documents were "material."

demonstrated by Judge Brown's dissenting opinion, because defendant did not impliedly represent that the documents accurately described the transaction, there is an absence of proof that he "used" the documents within the meaning of 18 U.S.C. § 1001.

BOYCE F. MARTIN, Jr., Circuit Judge, dissenting.

I join with Judge Brown in his persuasive dissent. I write further only to express several personal points concerning this case. Needless to say, I disagree with the majority's conclusion that Steele's conduct was punishable under 18 U.S.C. § 1001. I believe that the facts of this case do not establish a violation of section 1001. In its opinion, the majority fails to specify with any degree of certainty the conduct of the defendant that constituted a violation of section 1001. In failing to do so, the majority has left the public guessing as to what conduct they believe is criminalized by section 1001.

Under our system of taxation, citizens of this country are entrusted with the responsibility of both calculating the amount and paying their income taxes. Our taxation system would be inoperable, as are the tax systems of many other countries in the world, if this were not the case. Under the majority's view of the coverage of section 1001, no careful counselor, be he a certified public accountant or an attorney or even an advisor, will ever advise a taxpayer to do anything unless he can in fact certify to the truth of the documentation being offered to an agent of the Internal Revenue Service. This will needlessly delay, further complicate, and hopelessly snarl, what has been a reasonably effective system of the collection of the taxes in the four states that comprise our circuit.

I also join with Judge Brown in suggesting that the view taken by the Ninth and Fourth Circuits is far more realistic in the world of self-regulation than the position being taken by the majority. I realize that this presents little to convince my colleagues, however, I do feel strongly that with the majority's opinion we are taking a step backwards rather than a step forward.

## APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert L. STEELE,
Defendant-Appellant.

No. 87-4083.

United States Court of Appeals,
Sixth Circuit.

Argued Dec. 5, 1988.

Decided Feb. 14, 1990.

Arnold Morelli (argued), Bauer, Morelli & Heyd Co. LPA, Cincinnati, Ohio, for defendant-appellant.

Robert C. Brichler (argued), Asst. U.S. Atty., Cincinnati, Ohio, for plaintiff-appellee.

Before KRUPANSKY and RYAN, Circuit Judges; and BROWN, Senior Circuit Judge.

KRUPANSKY, Circuit Judge.

Robert L. Steele (Steele), defendant-appellant, has appealed his jury conviction on four criminal counts: conspiracy to defraud the Internal Revenue Service (IRS) in violation of 18 U.S.C.A. § 371; filing a false partnership income tax return in 1981 in violation of 26 U.S.C.A. § 7206(1); filing a false individual income tax return in 1981 in violation of 26

[1] On appellate review of a criminal conviction, this court must view the evidence presented during the trial in the light most favorable to the government, including the benefit of all inferences which can reasonably be drawn therefrom. *See Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States* v. *Adamo*, 742 F.2d 927, 932 (6th Cir. 1984), *cert. denied sub nom. Freeman* v. *United States*, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985).

U.S.C.A. § 7206(1); and knowingly submitting false documents to the IRS in violation of 18 U.S.C.A. § 1001.

The record disclosed the following underlying facts.[1] Steele was a certified public accountant who had founded and was employed by his own accounting firm, R. L. Steele & Company. In May, 1981, Steele formed a partnership with his wife, Mary L. Steele, Daniel A. Pelphrey, and his wife Karen Pelphrey, known as Woodland Heights, for the purpose of buying an 81.349 acre tract of real property situated in the Miami Township of Montgomery County, Ohio, which was to be subdivided into nine separate plots and then resold. On May 13, 1981, Steele, acting on behalf of the partnership, negotiated a contract for the purchase of the 81.349 acres with Rhea M. Shields (Shields), the owner of the property, under the terms of which the partnership would pay Shields $32,500 in cash and execute a mortgage in her favor for $229,000. The sale was consummated on July 21, 1981.

On July 21, 1981, immediately subsequent to acquiring the Woodland Heights property, Steele, acting on behalf of his partnership, entered into two separate land contracts to sell an 8.849 acre parcel and a 9.9 acre parcel of the Woodland Heights property to Thomas R. Duerr (Duerr). The purchase price of each parcel was $40,000 or a total of $80,000.

At the time of purchasing the two lots in 1981, Duerr confided to Steele that his total income was derived from distributing controlled substances and that, as a result, he reported only $12,000 to $15,000 per year on his individual income tax returns. Accordingly, since he had no legitimate and identifiable source of income which would justify an $80,000 land transaction and because he was fearful that the purchase of the two parcels of property would attract the attention of the IRS, Duerr suggested that the purchase price for the two lots of Woodland Heights property be recorded to inaccurately reflect a fictitious figure of $20,000 per parcel, or a total of $40,000.

As indicated, the two parcels of land were conveyed by separate land contracts. One of the conveyances identified

Duerr's father, Russell R. Duerr, Jr., as the purchaser, while the second conveyance listed Thomas R. Duerr as purchaser. The recorded land contracts reflected an initial $2,000 down payment, with a balance of $18,000 due and payable, on each of the contracts, with an interest rate of 11% per annum compounded monthly and payable in monthly installments of $247.96 until the balance due on each parcel was satisfied. Upon the execution of the land contracts, Duerr paid Steele an additional amount of $40,000 in cash which represented the difference between the actual purchase price of $80,000 and the fictitious sum of $40,000 which was reflected as the purchase price on the officially recorded conveyances. Steele paid $19,500 of this cash payment to the Pelphreys as their share of the proceeds from the sale and retained $20,500 himself.

On March 22, 1982, Steele filed a United States Partnership Tax Return, Form 1065, for the taxable year 1981 on behalf of the Woodland Heights partnership. Steele did not report the $40,000 cash payment which Duerr covertly had paid the partnership on July 21, 1981 as partnership income. Steele also failed to report the $20,500 cash payment on his 1981 individual income tax return, which represented his share of the $40,000 cash payment from Duerr. In contrast, Pelphrey reported the receipt of $19,500 he had received from Steele as partnership income on his 1981 United States Individual Income Tax Return.

In August, 1985, Duerr and several other individuals were indicted on various drug charges. Simultaneously, the IRS initiated an investigation of Duerr for possible fraudulent evasion of tax liability. On November 10, 1985, IRS Special Agent Dennis Hall (Hall) contacted Steele, and requested information concerning the sale of the two Woodland Heights parcels of land to Duerr in 1981; Steele, however, was not a target of the agent's inquiry. Hall advised Steele that the government required the information concerning payments made by Duerr for the purchase of the two Woodland Heights parcels in conjunction with its investigation of Duerr

for possible income tax evasion. Steele advised the IRS agent that he would comply.

Steele immediately thereafter arranged to meet with Duerr at a local restaurant, and after assuring himself that Duerr was not wired to record their conversation, asked him if he intended to enter a plea agreement and turn state's evidence. After Duerr had insisted that he had no such intent, Steele informed Duerr that an IRS agent had contacted him for information about the two Woodland Heights parcels which Duerr had purchased in 1981. Steele told Duerr that he, Steele, would confirm the fictitiously recorded sale prices, and would thereafter avoid further contact with the agent. On November 20, 1985, Steele delivered various documents to Hall relating to the property transactions between Woodland Heights and Duerr, which falsely reflected the purchase price of each of the two conveyed parcels of property as $20,000.

In December, 1985, Duerr plead guilty to one count of filing a false individual income tax statement and one count of using the telephone to facilitate a narcotics transaction and thereafter cooperated with the government. At that time, he disclosed the fraudulent land transactions which had taken place between himself and Steele in 1981. On March 24, 1987, a federal grand jury for the Southern District of Ohio issued a four-count indictment against Steele, alleging in Count I that Steele had conspired to obstruct the IRS in the computation, assessement and collection of income taxes; in Count II that Steele had filed a false partnership income tax return on behalf of the Woodland Heights partnership for the year 1981 by failing to report the full amount of the purchase price of the two lots sold to Duerr, since the return reported only a total sale price of $40,000 rather than actual price of $80,000; in Count III that Steele had filed a false individual federal income tax return for the year 1981 by failing to list the $20,500, which represented his share of the cash payment made to the partnership on July 21, 1981 by Duerr for the unrecorded balance due on the two Woodland Heights plots; and in Count IV that Steele had willfully and knowingly sub-

mitted false documents to the IRS agent concerning the true nature and amount of the land transaction between himself and Duerr.

A jury trial resulted in verdicts of guilty on all four counts charged. The district court sentenced Steele to three years imprisonment on Counts I, II, III and IV of the indictment, with the sentences to be served concurrently. Steele timely filed a notice of appeal from the final judgment entered by the district court.

On appeal, the defendant has argued that his conviction for submitting false information to the IRS, in violation of 18 U.S.C. § 1001, should be reversed and dismissed as a matter of law, urging that his actions did not constitute conduct which was prohibited under section 1001.[2] Steele has asserted that his false, fictitious and fraudulent statements concerning the sale of the two parcels of Woodlands Heights properties to Duerr were not actionable under 18 U.S.C. § 1001 because they constituted judicially created exceptions within the "exculpatory no" doctrine. In essence, the doctrine provides that, under certain circumstances, the government may not prosecute an individual for false or fraudulent statements which were made in response to questioning initiated by the government where a truthful statement would have incriminated the defendant. *United States* v. *Equihua-Juarez*, 851 F.2d 1222, 1224 (9th Cir. 1988) ("The 'exculpatory no' doctrine provides an exception to § 1001. If certain requirements are met, a person may not be prosecuted under § 1001 for making a false exculpatory response to government investigators."); *accord United States* v. *Olsowy*, 836 F.2d 439, 411 (9th Cir. 1987) ("The exception allows a suspect who is in

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[2] Section 1001 reads in pertinent part as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowlingly and willfully . . . makes any false, fictitious or fraudulent statements or representations, . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C.A. § 1001.

custody to deny involvement in the crime for which he was arrested without incurring additional criminal penalties."), *cert. denied*, 485 U.S. 991, 108 S.Ct. 1299, 99 L.Ed.2d 509 (1988); *United States* v. *Tabor*, 788 F.2d 714, 715 (11th Cir. 1986) ("[T]he federal courts have held that in some circumstances false statements exculpatory in nature, though made to a department or agency of the United States, are not criminalized by § 1001."). Although several circuits have recognized the "exculpatory no" doctrine, *see, e.g., United States* v. *Cogdell*, 844 F.2d 179, 182-85 (4th Cir. 1987); *United States* v. *Bush*, 503 F.2d 813, 815 (1974), *reh'g denied*, 511 F.2d 1402 (5th Cir. 1975); *United States* v. *King*, 613 F.2d 670, 674-75 (7th Cir. 1980); *United States* v. *Medina de Perez*, 799 F.2d 540, 541-44, 544-45 (9th Cir. 1986); *United States* v. *Tabor*, 788 F.2d 714, 718-19 (11th Cir. 1986), it is an issue of first impression in the Sixth Circuit.[3]

The "exculpatory no" doctrine, which appears to be receiving widespread acceptance by federal courts of appeals, is anchored, *inter alia*, upon the Fifth Amendment's protection against self incrimination through the use of compelled statements. *See, e.g., United States* v. *Equihua-Juarez*, 851 F.2d 1222, 1227 n. 10 (9th Cir. 1988); *United States* v. *Cogdell*, 844 F.2d 179, 183 (4th Cir. 1987); *United States* v. *Tabor*, 788 F.2d 714, 717 (11th Cir. 1986); *United States* v. *Lambert*, 501 F.2d 943, 946 n. 4 (5th Cir. 1974) (en banc); *compare United States* v. *Payne*, 750 F.2d 844, 861-63 (11th Cir. 1985). Because the Fifth Amendment prohibits any requirement that an individual respond to a directly in-

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[3] Defendant has suggested that this court's decision in *United States* v. *Aarons*, 718 F.2d 188 (1983), *rhg. denied per curiam*, 734 F.2d 1180 (6th Cir. 1984), impliedly adopted the "exculpatory no" exception. The decision in *Aarons*, however, did not consider the "exculpatory no" doctrine; the defendant Aarons was prosecuted for not volunteering information to the government. In the present case, Steele was charged with providing false and fraudulent information to the government and, consequently, *Aarons* is inapposite.

criminating inquiry, *see generally United States* v. *Alkhafaji*, 754 F.2d 641 (6th cir. 1985); *id.* at 648 (Krupansky, J., concurring), the "exculpatory no" doctrine recognizes that, under some circumstances, the government cannot prosecute a defendant under section 1001 for having provided a false or fraudulent answer to potentially incriminating questions.

Juxtaposed with the constitutionally protected right against self incrimination is the explicit recognition that Congress intentionally drafted Section 1001 in an expansive fashion in order that it be accorded the broadest possible interpretation regarding the situations in which it would come into play. *United States* v. *Rodgers*, 466 U.S. 475, 479-80, 104 S.Ct. 1942, 1946-47, 80 L.Ed.2d 492 (1984) (quoting *United States* v. *Gilliland*, 312 U.S. 86, 93, 61 S.Ct. 518, 522, 85 L.Ed. 598 (1941)). "There is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted." *Rodgers*, 466 U.S. at 481, 104 S.Ct. at 1947 (quoting *United States* v. *Bramblett*, 348 U.S. 503, 507, 75 S.Ct. 504, 507, 99 L.Ed. 594 (1955)); *see also Medina de Perez*, 799 F.2d at 543 & n. 4 and cases cited therein. Thus, the protection to be afforded to the right against self-incrimination must be balanced with the Supreme Court's teachings in *Rodgers* and its progeny that Congress had specifically intended the provision of section 1001 to be read in as expansive a fashion as is consistent with individual rights. *See, e.g., Cogdell*, 844 F.2d at 183 ("Accordingly, in applying the 'exculpatory no' doctrine, we balance the need for protecting the basic functions of government agencies with the concern that a criminal suspect not be forced to incriminate himself in order to avoid punishment under section 1001.").

In striking this balance, the courts have expressed an awareness that the scope of the "exculpatory no" "exception is of necessity limited and does not apply in every case where a question is asked by a government official during the course of an investigation." *Olsowy*, 836 F.2d at 441; *see also Equihua-Juarez*, 851 F.2d at 1224; *Cogdell*, 844 F.2d at 183.

In particular, the "exculpatory no" exception has been found inapplicable where, *inter alia*, the particular "government agencies inquiries constituted a 'routine exercise of administrative responsibility,' " or where "the false statement [would] 'impair the basic functions entrusted by law' to that agency."[4] *Medina de Perez*, 799 F.2d at 544 n. 5 (quoting *United States* v. *Bedore*, 455 F.2d 1109, 1111 (9th Cir. 1972) and *United States* v. *Rose*, 570 F.2d 1358, 1364 (9th Cir. 1978) (emphasis omitted)); *accord United States* v. *Becker*, 855 F.2d 644, 646 (9th Cir. 1988); *Equihua-Juarez*, 851 F.2d at 1224; *Cogdell*, 844 F.2d at 183; *see also Olsowy*, 836 F.2d at 441; *Bush*, 503 F.2d at 815-19. Moreover, the burden rests upon the criminal defendant to prove that the facts presented in his particular situation are appropriate "to invoke th[e] ['exculpatory no'] exception." *Olsowy*, 836 F.2d at 411 & n. 2 (citing *Rodgers*, 466 U.S. at 477, 104 S.Ct. at 1945 and *Medina de Perez*, 799 F.2d at 544 n. 5); *see also Becker*, 855 F.2d at 646.

It is generally regarded that "the 'exculpatory no' exception applies when the inquiring government agent acts as a police

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[4] The courts which have considered the "exculpatory no" exception have generally set forth a five-part test which must me met to invoke the doctrine:

> (1) the false statement must be unrelated to a privilege or a claim against the government; (2) the declarant must be responding to inquiries initiated by a federal agency or department; (3) a truthful answer would involve self-incrimination; (4) the government agency's inquiries must not constitute a routine exercise of administrative, as opposed to investigative, responsibility; and (5) the false statement must not impair the basic functions entrusted by law to the agency.

*Becker*, 855 F.2d at 646; *see also Equihaua-Juarez*, 851 F.2d at 1224; *Cogdell*, 844 F.2d at 183; *Medina de Perez*, 799 F.2d at 544 & n. 5. In the case at bar, it is undisputed that Steele had responded to Agent Hall's request for information; that the information was not made in the course of a claim against the government; and that a truthful response by Steele would have been incriminating.

investigator and not when the agent's questions constitute a routine exercise of administrative responsibility." *Equihua-Juarez*, 851 F.2d at 1225; *see also Cogdell*, 844 F.2d at 184; *Medina de Perez*, 799 F.2d at 545; *accord Bush*, 503 F.2d at 815 ("Section 1001 has usually been held inapplicable to statements made to government agents acting in a purely 'police' capacity."). "The term 'administrative' has been used in these cases to distinguish situations in which government agents are acting as 'police investigators' rather than as 'administrators.' In routine administrative inquiries, the exculpatory no defense cannot be properly invoked." *Becker*, 855 F.2d 644, 646 (citing *Medina de Perez*, 799 F.2d at 545).

> [T]hat the statement be uttered in response to investigative inquiries rather than inquiries that represent routine exercises of administrative authority . . . touches the core or the reason for the "exculpatory no" exception. False statements that pervert an agency's routine administrative functions are the specific target Congress intended the statute to reach, . . . while the exception was created to protect negative responses to interrogation by a criminal investigator.

*Cogdell*, 844 F.2d at 184 (citations omitted).

In the case at bar, Steele was charged with and convicted of making false statements to the IRS agent who was investigating possible criminal activity by Duerr. During the course of his criminal investigation of Duerr, Hall had requested Steele to provide him with all information within his possession concerning the sale price and financing of the two parcels of land by the Woodland Heights partnership to Duerr. In response, Steele forwarded copies of documents to the IRS agent which indicated that the two plots had been sold for $20,000 each, for an aggregate price of $40,000. In submitting these documents to the IRS agent, Steele represented that they constituted the totality of available information in his possession concerning the sale of the two lots and the financing of that transaction and did not disclose the

additional $40,000 which Duerr had paid to the partnership in cash.

"Clearly the agents in the case were not present as tax collectors, privilege conferrers, or regulators — they were policemen." *United States* v. *Goldfine*, 538 F.2d 815, 822 (9th Cir. 1976) (Ferguson, J., concurring in part, dissenting in part).

> That the procedure employed here may be routine does not change the basic fact that the IRS turned to an agency of criminal investigators for help in solving a suspected crime, and that the investigation was essentially criminal in nature.

*Cogdell*, 844 F.2d at 185 n. 7. Accordingly, the inquiries which Hall made of Steele in the instant case were in the course of a criminal investigation, rather than during "a routine exercise of administrative responsibility." *Equihau-Juarez*, 851 F.2d at 1225.

Although Hall has requested the information from Steele within the context of a criminal investigation of Duerr, rather than an investigation of Steele himself, that fact does not remove Steele from the ambit of the "exculpatory no" exception. "The 'exculpatory no' exception . . . is not limited to situations where an individual is being formally interrogated." *Equihua-Juarez*, 851 F.2d at 1228 n. 8. The doctrine has been equally applied to situations where "seemingly neutral questions constitute interrogation when they are reasonably likely to elicit incriminating information relevant to establishing elements necessary for conviction of the charged offense." *Equihua-Juarez*, 851 F.2d at 1226 (citations omitted).

> [S]ection [1001] does not usher a heads we win — tails you lose philosophy into the criminal justice system. ("If you tell our version of the truth, we will call it an admission and use it against you on the substantive offense; If you tell us something which materially varies

> from our version of the truth, we will charge you with a § 1001 felony.").

*Goldfine*, 538 F.2d at 821 (Ferguson, J., concurring in part, dissenting in part) (footnote omitted).

Moreover, the "exculpatory no" doctrine has been invoked under circumstances similar to the case at bar, wherein the defendant was interrogated about an underlying criminal investigation of another individual. *See, e.g., Tabor*, 788 F.2d at 715-16 (IRS questioned defendant during criminal investigation of another person concerning her actions in notarizing mortgages); *Bush*, 503 F.2d at 814 (IRS agents questioned defendant after learning of possible kickbacks he had paid to another person under criminal investigation; however, IRS agents did not warn defendant that he was under investigation or suspicion at the time); *compare King*, 613 F.2d at 675 ("This is not a case like *United States* v. *Bush*, 503 F.2d 813 (5th Cir. 1974), in which the government unsuccessfully sought to apply section 1001 to a defendant who gave simply negative exculpatory answers to questions posed pursuant to an investigation of someone else."); *United States* v. *Johnson*, 530 F.2d 52, 55 (5th Cir. 1976) ("Section 1001 does not apply to mere answers, including untruthful ones, to investigators' question. . . ."), *cert. denied*, 429 U.S. 833, 97 S.Ct. 96, 50 L.Ed.2d 97 (1976); *United Sates* v. *McCue*, 301 F.2d 452, 455 (2nd Cir.) (The "exculpatory no" doctrine was held inapplicable because "the appellants *voluntarily* appeared before three representatives of the Treasury under circumstances in which they were well aware of the nature and purpose of the examination[;] [t]hey were accompanied by counsel and they were questioned under oath.") (emphasis added), *cert. denied*, 370 U.S. 939, 82 S.Ct. 1586, 8 L.Ed.2d 808 (1962).

Additionally, the false statements given by the defendant in response to the government's inquiry did not directly threatened to "impair the basic functions entrusted by law" to the IRS. *Olsowy*, 836 F.2d at 41; *Medina de Perez*, 799 F.2d at 544 n. 5; *Bedore*, 455 F.2d at 1111. In *Rodgers* the

Supreme Court explicitly recognized the importance of "protecting the integrity of official inquiries." *Rodgers*, 466 U.S. at 481, 104 S.Ct. at 1947 (quoting *Bryson* v. *United States*, 396 U.S. 64, 70-71, 90 S.Ct. 355, 359-60, 24 L.Ed.2d 264 (1969)). "The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *Gilliland*, 312 U.S. at 93, 61 S.Ct. at 522; *United States* v. *Aarons*, 718 F.2d 188, 190 (1983) (same), *reh'g denied per curiam*, 734 F.2d 1180 (6th Cir. 1984).

In light of its need for accurate information, admittedly any false information provided to IRS agents in the course of an investigative inquiry would, to some extent, tend to frustrate the government's basic function of monitoring and collecting tax liabilities "because underlying any tax inquiry is the question of monetary loss to government." *United States* v. *Chevoor*, 526 F.2d 178, 183 (1st Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed.2d 176 (1976); *accord McCue*, 301 F.2d at 455 ("There is no reason to believe that the administration of the tax laws and the collection of the taxes is not one of the processes of government which the statute was designed to protect, or that making false statements about taxes to the representatives of the Treasury is not the kind of interference and obstruction which the statute was intended to prevent."). However, the possibility that an untruthful answer would "impair the basic functions" of the IRS are concomitantly lessened in the context of a criminal investigation, wherein government agents are attempting to determine whether criminal activity has occurred, because "a competent government investigator will anticipate that the defendant will make exculpatory statements," and, accordingly, "a thorough agent would continue vigorous investigation of all leads until satisfied that he has obtained the truth." *Equihua-Juarez*, 851 F.2d at 1225 (quoting *Medina de Perez*, 799 F.2d at 546).

A number of courts have held that the "exculpatory no" exception is applicable under similar circumstances to those

presented by the instant case, concluding that a "false statement, given in response to inquiries by government investigative agents in an interview that the defendant did not initiate, [is] not the type of statement that perverts an investigative agency's function." *Medina de Perez*, 799 F.2d at 546; *accord Gogdell*, 844 F.2d at 184 ("A false denial of guilt does not pervert the investigator's basic function in the manner the statute was intended to combat, but is merely one of the ordinary obstacles confronted in a criminal investigation."); *Lambert*, 501 F.2d at 946 (*en banc* court noting that "an exculpatory denial by a person under investigation may have less potential for misleading" a government agency); *compare Bush*, 503 F.2d at 818 n. 2 (Distinguishing instances where IRS agents acts as a "policeman" from those instances where he merely fulfils an administrative role of collecting information.). *See generally Medina de Perez*, 799 F.2d at 545 n. 5; *Chevoor*, 526 F.2d at 183 n. 9.

> While the Special Agent [of the IRS] may have been disappointed that defendant would not truthfully answer himself into a felony conviction, we fail to see that his investigative function was in any way perverted. The only possible effect of exculpatory denials however false, received from a suspect such as defendant is to stimulate the agent to carry out his function.

*Paternostro* v. *United States*, 311 F.2d 298, 303-04 (5th Cir. 1962) (quoting with approval from *United States* v. *Philippe*, 173 F.Supp. 582, 584 (S.D.N.Y. 1959)). "[I]t is a fundamental premise of our criminal justice system that the detection of crimes does not depend on assuring that the accused individuals be forced to tell the truth to law enforcement agents." *Goldfine*, 538 F.2d at 825 (Ferguson, J., concurring in part, dissenting in part). Accordingly, because the false statements which Steele made to the IRS agent occurred during the course of a criminal investigation of Duerr's tax liability and fraudulent activity, and because a truthful response by Steele to the IRS agent's inquiry would have been patently in-

criminating statements regarding his, Steele's, criminal activity, the appellant had satisfied his burden of proving that the false statements at issue in the instant appeal were within the ambit of the "exculpatory no" exception to section 1001.

Steele has alternatively urged that the district court erred in deciding that his failure to have reported some $20,000 on his 1981 federal individual tax form and some $40,000 on the partnership tax form for the same year constituted a material omission from his tax return. He has argued that the materiality of his failure to report the above sums on the individual and partnership returns was a factual issue to be submitted to the jury. *See United States* v. *Null*, 415 F.2d 1178, 1181 (4th Cir. 1969), *See generally Carella* v. *California*, ____ U.S. ____, ____, 109 S.Ct. 2419, 2421, 105 L.Ed.2d 218 (U.S. 1989) (Scalia, J., concurring) (Failure to submit material issue of fact to jury constitutes reversible error "because it ' "invade[s] [the] factfinding function" which in a criminal case the law assigns solely to the jury.' ") (quoting *Sandstrom* v. *Montana*, 442 U.S. 510, 523, 99 S.Ct. 2450, 2459, 61 L.Ed2d 39 (1979) (quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 446, 98 S.Ct. 2864, 2878, 57 L.Ed.2d 854 (1978) (footnote omitted))); *United States* v. *Mentz*, 840 F.2d 315, 320 (6th Cir. 1988) (same). Steele accordingly contended that his conviction on Counts II and III of the indictment should be reversed.

The United States Supreme Court, in *Kungys* v. *United States*, 485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988), has recently revisited the issue of materiality imposed by federal criminal statutes as it bears upon disclosure of information in response to inquiries from federal agencies, and has attempted to distinguish between materiality as a question of fact for determination of the fact finder or a question of law to be resolved by the court. *Kungys* v. *United States*, 485 U.S. 759, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988) (examining issue of materiality under reporting requirements of the Department of Immigration and Naturalization). After reviewing the criteria employed by various courts of appeals within the context of a variety of criminal reporting statutes, including

this circuit's discussion in *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821, 104 S.Ct. 86, 78 L.Ed.2d 95 (1983),[5] the Supreme Court concluded that the issue of materiality is generally treated as question of law to be decided by the court.

> [W]e must first consider whether materiality . . . is an issue of law, which we may decide for ourselves, or one of fact, which must be decided by the trial court. Here again we see no reason not to follow what has been done with the materiality requirement under other statutes dealing with misrepresentations to public officers. "[T]he materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." *Sinclair* v. *United States*, 279 U.S. 263, 298, 49 S.Ct. 268, 273, 73 L.Ed. 692 (1929). As

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[5] In *Abadi*, this court concluded that the question of materiality in criminal statutes generally presents an issue of law to be decided by the court rather than the trier of fact.

> The defendant contends that the issue is a factual question to be submitted to the jury like the other essential elements of the offense. . . . While this circuit has not passed on this issue in the context of a false statement prosecution under 18 U.S.C. § 1001, we have ruled that materiality in a question of law in a perjury prosecution under 18 U.S.C. § 1621, . . . and in a prosecution for false statements to a grand jury under 18 U.S.C. § 1623. . . .
>
> After careful consideration, we hold that the materiality issue in a section 1001 prosecution should be treated as a question of law. *Abadi*, 706 F.2d at 180 (citations omitted); *see also United States* v. *Keefer*, 799 F.2d 1115, 1126 (6th Cir. 1986) ("[M]ateriality is a question of law for the court to decide. . . . 'The materiality of a statement rests upon a factual evidentiary showing, but the ultimate decision is a legal one.' ") (quoting *United States* v. *Beer*, 518 F.2d 168, 172 (5th Cir. 1975)) (other citations omitted); *United States* v. *Chandler*, 752 F.2d 1148, 1150-51 (6th Cir. 1985) ("Materiality under § 1001 is a question of law. . . . It is not an element of the offense that must be proved beyond a reasonable doubt but a 'judicially-imposed limitation to insure the reasonable application of the statute.' ") (quoting *Abadi*, 706 F.2d at 180 n. 2).

the Sixth Circuit has said in a case involving 18 U.S.C. § 1001,

> [a]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law. Since it is the court's responsibility to interpret the substantive law, we believe [it is proper to treat] the issue of materiality as a legal question.

*Kungys*, 485 U.S. at 772, 108, S.Ct. at 1547 (quoting *Abadi*, 706 F.2d at 180); *compare United States* v. *Hartness*, 845 F.2d 158, 161 n. 4 (8th Cir. 1988) (materiality generally a question of law for the court to determine). Defendant's characterization of this issue as a question of fact for the jury is foreclosed by the Supreme Court's pronouncements in *Kungys*, as well as existing precedent in this circuit.

Additionally, the defendant has challenged the district court's conclusion that the exclusion of some $20,000 of income on his 1981 federal individual income tax return, and some $40,000 of income on the 1981 partnership tax return for Woodland Heights, was material under the circumstances involved in the instant case. Steele argued that even if he had reported this income to the IRS in his individual and partnership tax returns, his actual tax liability in 1981 would not have been affected and, consequently, the omission of this information could not have been "material" since it had no financial impact upon his tax liability to the IRS for that period. This argument, however, is not well taken.

In *Kungys*, the Supreme Court indicated that the proper test for determining materiality was not whether the omission of particular information would have *actually* affected the decision of a governmental agency, but rather it was "whether the misrepresentation or concealment was *predictably capable of affecting, i.e., had a natural tendency to affect*, the official decision." *Kungys*, 485 U.S. at 771-72, 108 S.Ct. at 1547 (emphasis added); *accord Keefer*, 799 F.2d at 1126 ("The test for materiality is whether 'the false statement "had a *natural tendency* to influence, or *was capable of* in-

fluencing, the decision" of the agency.' ") (quoting *Chandler*, 752 F.2d at 1151 (quoting *Weinstock* v. *United States*, 231 F.2d 699, 701-02 (D.C. Cir. 1956))) (Emphasis added.). In the case at bar, it is indisputable that the underreporting of taxable income, in the amounts of $20,500 and $40,000, was "predictably capable of affecting," and "had a natural tendency to influence," the IRS's determination of Steele's potential tax liability. The fact that this underreporting did not ultimately alter his actual tax liability is accordingly not relevant, and the assignment of error is without merit.

This court has considered the defendant's remaining assignments of error and has concluded that they are without merit. Accordingly, the judgment of conviction entered against the defendant Steele is hereby AFFIRMED, with the exception of the judgment arising from his conviction on count 4 of the indictment, which is hereby REVERSED and the case is REMANDED with instructions to enter a judgment of acquittal as to that count and for the limited purpose of resentencing the defendant.

RYAN, Circuit Judge, dissenting.

The burden of the court's decision today is that the plain and unambiguous language of 18 U.S.C. § 1001 shall not be applied as written in the case before us because "a truthful response by Steele to the IRS agent's inquiry would have been patently incriminating . . ." Thus, the panel aligns this court with a number of circuits that have subscribed to what has come to be called the "exculpatory no" doctrine exception to § 1001.

Because I am satisfied that the court and the circuits it follows have erred, I must dissent with respect to the reversal of the defendant's conviction of count IV of the indictment.

I.

The genesis of the idea that § 1001 should not be applied as written in certain cases is a trial court opinion emanating from a United States District Court for the District of

Maryland in 1955, *U.S.* v. *Stark*, 131 F.Supp. 190 (D.Md. 1955), in which the court held that certain false negative answers, given under oath to agents of the Federal Bureau of Investigation, were not "statements" within the meaning of § 1001. There issued, thereafter, a line of cases from several courts to the general effect that § 1001 will not be applied to false negative answers to official inquiries when the speaker elects to make the untruthful response because a truthful answer would be "incriminating." The earliest court of appeals cases refusing to apply § 1001 as written followed the *Stark* reasoning that a negative answer of the kind described was simply not a "statement" within the meaning of § 1001. *Paternostro* v. *United States*, 311 F.2d 298, 305 (5th Cir. 1962), *United States* v. *Bedore*, 455 F.2d 1109, 1111 (9th Cir. 1972).

Understandably, that reasoning attracted little support. Later decisions from courts refusing to apply the statute as written augmented their citation to *Stark* with the further rationale that when a truthful statement to an official inquiry would be incriminating, a false negative statement should be insulated from the application of § 1001 by the judicial invention of an "exception" for such negative falsehoods.

Over the years, judicial refusal to obey the command of § 1001 in such circumstances was first given the name an "exculpatory no" statement, then labeled an "exception" to the statute, and, finally, elevated to the stature of a "doctrine." And thus, it is that in a span of a few years a federal trial court's refusal to apply a criminal statute as written, manifestly because it struck the court as unfair to do so, became a judge-made "exception" to an Act of Congress and, for a touch of judicial legitimacy, was labeled a "doctrine."

Now this court has taken the matter a step further by refusing to apply the statute, not to a merely negative reply to an official inquiry, but to the affirmative act of knowingly submitting false written documents to the government, describing a real estate transaction to be what it is not. A slippery slope, this business of writing judge-made exceptions into an Act of Congress.

II.

Section 1001 is written in direct, simple, and unambiguous language. It says:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Assigning to the words used in the statute their primary and generally accepted meaning, it is indisputable that they make criminal defendant Steele's act of knowingly submitting documents to IRS Agent Hall whcih falsely described details of the real estate transaction with James Duerr.

The syllogism goes like this:

Major: All false, fictitious, or fraudulent representations, knowingly made, to an agency of the goverment, regarding a matter within its jurisdiction is a crime.

Minor: But Steel knowingly made a false and fictitious representation to a government agency regarding a matter within its jurisdiction.

Conclusion: Therefore, Steel's representation, knowingly made, is a crime.

But my brothers say the statute should not be applied to Steele because to do so would be unfair; unfair because the only way Steele could avoid violating the statute was to incriminate himself. Therefore, the court reasons, it is necessary that the judicially conceived "exculpatory no" exception be read into the statute in order to make it inapplicable to situations such as the one at hand, to which, by the statute's

unambiguous terms, it is plainly applicable. Stated differently, if Steele chose to violate the statute in order to avoid incriminating himself, his violation should be excused because his purpose is valid. Thus, is the end made to justify the means. And if Congress, having written a statute which contains no exception for Steele's situation, did not see fit to excuse Steele, this court will excuse him by simply declaring that from this day forward there is, in this circuit, an exception to the statute for people in Steele's circumstances.

Regrettably, the court's opinion is mistaken both as a matter of *fact* and as a matter of *law*.

It is mistaken as a matter of *fact* because it is simply not true that the only alternative available to Steele, if he wished to avoid violating § 1001, was to submit valid documents to the IRS and thus incriminate himself. In fact, he had another very familiar and constitutionally protected alternative. He could have refused to provide the IRS with the documents they requested concerning the real estate transaction, and, if lawfully ordered to do so, he might simply have responded that he declined to provide the documents or to answer any questions, invoking his constitutional right against self-incrimination. Had he done either of those things, he would not have violated the statute and he would not have incriminated himself. It is difficult to understand why the court concludes today that Steele's only alternative to violating the statute was self-incrimination when, plainly, it was not.

And the court is also mistaken as a matter of *law*.

No matter how many circuits have concluded that § 1001 would be fairer if it contained an exception for circumstances of the kind faced by Steele, the fact is that the statute does not contain such an exception. Congress, cognizant of the argument that some people think it was unfair of Congress to make it a crime to provide the government with false information when supplying truthful information would be incriminating, has declined to write an "exculpatory no" exception into § 1001. Whether the statute would be wiser or fairer were such an exception part of it is quite beside the point.

Courts simply have no authority to create one. While there is no question that courts have the authority to create exceptions to judge-made law, there is likewise no question that they have no authority to do so with respect to congressional enactments.

As Judge William Wilkins put it in his dissenting opinion in *United States* v. *Cogdell*, 844 F.2d 179, 187 (4th Cir. 1988):

> While there is an appealing argument that for policy reasons Congress should amend section 1001 by incorporating the exculpatory no doctrine, this is a responsibility of Congress, not the courts.

In a word, the utter absence of lawful authority in a federal court, trial or appellate, to rewrite a congressional enactment by creating an exception which cannot, by any stretch of the imagination, be found in the language of the statute, explicitly or implicitly, is too self-evident to warrant citation of authority.

All judges and lawyers are familiar with judicial decisions in which courts interpret or construe ambiguous or otherwise unclear statutes in ways that exclude their application in certain situations arguably within the letter of the statute, but thought by the court not to be within the intent of the lawmaker. But here there is not so much as lip service to that sort of reasoning. With admirable forthrightness, the court today does not suggest that it is interpreting or construing § 1001 or that it is ambiguous in any way. Rather, relying almost entirely upon statements by other circuits in cases involving distinctly different facts, it opts to subscribe to the legally unsupportable argument that a simple, plain, direct, and unambiguous criminal statute can be made to mean what it does not say simply be adoption of a judicially invented "exception."

The only hint of legal reasoning of any sort offered as justification for what the court has done today is the following:

> The "exculpatory no" doctrine, which appears to be receiving widespread acceptance by federal courts of appeals, is anchored, *inter alia*, upon the fifth amendment's protection against self-incrimination through the use of compelled statements.

P. 1001 (citations omitted).

Despite that statement, it is noteworthy that the court does not hold that the statute is unconstitutional or in any fashion impinges upon the defendant's fifth amendment privilege against self-incrimination, facially or as applied. Rather, the new "doctrine" is merely "anchored" upon the fifth amendment. In addition, the court does not hold or suggest, implicitly or otherwise, that the false documents submitted to Agent Hall by Steele were "compelled" statements. Rather, the "fifth amendment . . . self-incrimination" language in the court's opinion, and in the opinions it cites from sister circuits, is used as a sort of judicial talisman, giving the ring of constitutional legitimacy to what actually is a simple judicial refusal to apply a statute the court deems unfair.

Respectfully, the legal and logical invalidity of the rule the court has adopted today cannot be justified either by the desirability of the end achieved, the court's power, as distinguished from its authority, to do what it has done, or the number of other circuits in which today's reasoning is "receiving widespread acceptance."

For the foregoing reasons, and because I concur in the court's disposition of the remaining issues, I would affirm the judgment entered below.

## APPENDIX C

### JURY INSTRUCTION 4003

**MAKING AND SUBSCRIBING FALSE STATEMENTS ON TAX RETURNS — ESSENTIAL ELEMENTS**

In order to establish each offense of making and subscribing false statements on tax returns, as charged in Counts II and III of the Indictment, the Government must prove the following essential elements beyond a reasonable doubt:

*First*, that the Defendant made, signed, and filed a tax return;

*Second*, that this tax return contained a written declaration that it was made under the penalties of perjury;

*Third*, that this tax return was false as to a material matter;

*Fourth*, that when the Defendant made and subscribed this tax return he did so willfully and did not believe that the tax return was true and correct as to every material matter.

## APPENDIX D

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### JURY INSTRUCTION 4007

### MATERIALITY

The materiality of the statements made on Mr. Steele's tax returns which he allegedly believed to be false is not a matter with which you, the jury, are to be concerned, but rather is a question for the Court to decide. You are instructed that statements or omissions as to gross income constitute material matters.